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In the
Supreme Court of the United States

October Term, 1949

No. ~~842~~ 102

HENRY M. GARSSON,
Petitioner

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, BRIEF IN SUPPORT THEREOF, AND MOTION TO DISPENSE WITH PRINTING OF RECORD

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1949

No. .....

Henry M. Garsson,

Petitioner

vs.

The United States of America

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Henry M. Garsson, Petitioner, respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia, entered in the above cause on January 24, 1949, affirming the judgment of the United States District Court for the District of Columbia convicting him in Count I, together with Andrew J. May and Murray W. Garsson, of conspiracy under 18 U. S. C. A. Section 88 (C. C. Section 37, Rev. Stat. Section

5440 as amended, 35 Stat. 1096, 1909), to commit an offense against the United States (that is to violate Section 203 of Title 18 of the United States Code—Rev. Stat. Section 1782, 35 Stat. 1109-(1909) 54 Stat. 1021 (1940))—and to defraud the United States, and of two substantive Counts (III and IV) charging violations of 18 U. S. C. A. Section 338.

OPINIONS BELOW

The District Court issued no formal opinion in denying motions for judgments of acquittal and for new trial.

The Court Below in affirming the judgments, was divided in its Opinion (App. 1). Judges Edgarton and Prettyman constituted the majority and Chief Justice Stephens filed a dissenting Opinion. The majority and dissenting Opinions of the Court of Appeals are not reported as of this date.

JURISDICTION

The judgment of the Court of Appeals sought to be reviewed was entered on January 24, 1949[1]. A petition for Rehearing was presented to the said Court in due season, and on April 6, 1949, a rehearing was refused. No opinion was rendered. The time for filing Petition for Writ of Certiorari on April 20, 1949 was extended by this Court to and including June 4, 1949. The Jurisdiction of this Court to review the judgments in question is invoked under (Sec. 240a of the Judicial Code as amended (U.S.C. Title 28, Judiciary and Judicial Procedure, Sec. 1254) by the Act of February 13, 1925) Act of June 25, 1948, C. 646, Sec. 39, 62 Stat. 992—Sec. 1254 of U. S. C. Title 28 Judiciary and Judicial Procedure. See also Rules 11 and 13 of the Rules of Practice on Procedure in Criminal Cases promulgated by this Court on May 7, 1934, and Rule 37 of the Rules of Criminal Procedure for Federal Courts.

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[1] The "App." designation refers to the Appendix to this Petition and Brief which is printed as a separate document. The Record was not printed in the Court Below (See Rule 39 of Federal Rules of Criminal Procedure) and Motion was duly filed in this Court seeking leave to dispense with the printing of the Record on Petition for Certiorari. This Motion is printed as an addendum to this Petition and Brief. The portions of the Record material to the consideration of the questions herein presented are set out in the Appendix. References to the original Record bear the designation "R". References to the Opinion of the Court of Appeals bear the designation "Op."

SUMMARY STATEMENT OF THE FACTS AND OF THE MATTER INVOLVED

Petitioner is one of four defendants who were indicted on January 23, 1947, charged in Count I of the Indictment with having conspired together, in violation of 18 U. S. C. A. Sec. 88, to violate Sec. 203 of Title 18 of the United States Code and to defraud the United States, and in Counts II and III and IV with substantive violations of 18 U. S. C. A. Sec. 203. The defendants were Andrew J. May, a member of the House of Representatives and Chairman of its Committee on Military Affairs; Henry M. Garsson, an officer, director and stockholder in two corporations, Erie Basin Metal Products, Inc. and Batavia Metal Products, Inc., located near Chicago, Illinois, which were engaged in the production of war material under contracts with the War Department; Murray W. Garsson and Joseph F. Freeman, employees of said corporations.

Count I of the indictment charged that said four defendants from January 1, 1942 to December 31, 1946, in the District of Columbia conspired together to (a) violate 18 U. S. C. A. Sec. 203, in that May, a member of Congress, would receive and agree to receive directly and indirectly from Erie and Batavia, said two corporations engaged in the State of Illinois in the production of war materials, and from defendants Henry Garsson, Murray Garsson and Freeman compensation

for services rendered and to be rendered by said May to the said corporations and to the said defendants, in relation to matters in which the United States was a party and in which the United States was directly and indirectly interested before the War Department of the United States; and (b) to defraud the United States of its right to have its business conducted honestly and impartially and to have its officials free to transact that business unhampered by dishonest influence, and to have the duties of May as a Congressman performed honestly and impartially. It described the manner of carrying out the alleged illegal agreement and the nature of the alleged defrauding, and charged 35 overt acts, alleged to have been participated in by one or more of the conspirators for the purpose of effecting the objects of the conspiracy.

Generally, the indictment charges that during the years 1942 to 1946 Erie Basin and Batavia had certain contracts with the War Department for the production of war material and that the Garssons and Freeman were also interested in commissions, promotions, furloughs and transfers in the Army for relatives and friends. It charged that on certain occasions May telephoned, called personally, or wrote officials of the War Department in respect to certain matters in which these corporations, the petitioners[2] and Freeman were alleged interested, and brought his official prestige and influence to bear upon those officers in order to promote

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[2] Petitions for Writs of Certiorari have also been filed by petitioners May and Murray W. Garsson.

the interests of these parties. It was alleged that from time to time during this period petitioners and Freeman paid May large sums of money, and that these payments were compensation for services rendered. Further, the Indictment alleged that some of the payments to May were direct and that some were indirect through a medium of a corporation, the Cumberland Lumber Company, which was organized and operated for the alleged purpose of concealing the payments (App. 5-6).

Count III alleged that in violation of 18 U. S. C. A. Sec. 203, during the period of said alleged conspiracy (1942-1946) at Washington, on August 22, 1944, May *did receive* from petitioners and the Erie Company a check drawn by Erie for the value of $5,000 as compensation for services rendered them by him in relation to contracts and other matters before the War Department. The Indictment alleged that the Garssons and Freeman aided and abetted May in the unlawful receipt of that compensation (App. 14-15).

Count IV alleged that in violation of U. S. C. A. Sec. 203, at Washington on or about January 27, 1944, May agreed to receive, directly and indirectly, from the Garssons, Freeman and Erie and Batavia as compensation for services rendered and to be rendered by May to said defendants and corporations, for services in matters before the War Department the amounts of $15,477.60 from Batavia and $38,156.47 from Erie. It also charged that the Garssons and Freeman aided and abetted May in the unlawful receipt of that compensation (App. 15-16).

Summary Statement of Facts and Matter Involved

Preliminary motions were filed by the petitioners to dismiss the Indictment and for the return of illegally seized papers and for the suppression of evidence derived therefrom (App. 31, 42, 48, 83, 90), and to inspect the Grand Jury minutes (App. 30). All of said motions were overruled by the District Court on April 18, 1947 (App. 97).

A trial in this case was had before Judge Henry Schweinhaut, District Judge, and a jury, and lasted from April 22, 1947 to July 3, 1947. A Motion for Judgment of Acquittal was granted as to the second count, the prosecutor elected to stand upon the third count as an alternative. The Court entered a judgment of acquittal as to defendant Freeman. May and the petitioners were convicted on Counts I, III and IV of said Indictment (App. 135).

Motions by May and these petitioners for judgment of acquittal and arrest of judgment and for new trial, and supplemental motions for examination of jurors and for new trial were denied on July 25, 1947 (App. 138-149). May, Murray Garsson and the petitioner duly entered appeals from the judgments of the District Court. The Court of Appeals entered judgments of affirmance.

The Court of Appeals was divided in its opinion as to the validity of the Indictment as against the petitioner and Murray Garsson (See Minority Opinion of Stephens, J.).

The Facts: The evidence at the trial disclosed that all the acts performed by these defendants and all the

declarations uttered by them in and of themselves were lawful and proper. This premise was recognized by the District Judge in his charge (R. 6978-6979):

> "I was also asked to tell you, and I do, that *Congressman May had a right, as any member of Congress would have, and that he, as Chairman of the House Military Affairs Committee had to make inquiries of various officers and agencies* and to inquire about situations pertinent to the position and his duties as a member of the House Military Affairs Committee and so forth. None of that. I do not think, at the moment, of any single overt act alleged or proved which, in itself, was a thing that either by law or otherwise, he did not have a right to do; for instance, specifically telephoning Secretary Patterson, General Campbell. *There is nothing illegal about that, in itself.* What is illegal about it, if anything, is whether he did it for compensation. * * * He had a right to be in business. He had a right to be in the Cumberland Lumber Company. *He had a right to do all these things.* In and of themselves there is nothing wrong with them, but they are all wrong if he did it for compensation and the government would only have to satisfy you that he did one of those things if you believe there was this illegal agreement. It isn't necessary to prove them all." (Italics ours).

Petitioner, Henry M. Garsson, a mechanical engineer, was an officer and minority stockholder of Erie Basin Metal Products, Inc. and Batavia Metal Prod-

ucts, Inc., manufacturing companies which were equipped for war production and did produce munitions under war contracts, with excellent production records. He became a majority stockholder in Batavia, Inc. in June, 1944.

Petitioner, Murray W. Garsson, and defendant Freeman (who was acquitted by the Trial Judge) were employees of both these corporations (The above corporations hereafter will be respectively referred to as Erie Basin and Batavia).

Representatives of Erie Basin and Batavia, particularly Freeman, brought to the attention of May, as Chairman of the Military Affairs Committee, certain discriminatory practices in various branches of the War Department, particularly in the Chicago Ordnance District. The evidence was undisputed that before the corporate representatives brought to May information of conditions they considered detrimental to the war effort that they had exhausted all remedies and appeals within the Governmental agencies.

The discrimination against Erie Basin and Batavia and the subsequent appeals to Chairman May centered around eight subject matters:

(a) Discrimination by Chicago Ordnance District in failing to give these firms an opportunity to bid on contracts on items for which they were equipped, while giving contracts on the same items without competitive bidding to larger companies;

(b) Termination of a Chemical Warfare Service truck contract on the ground that certain chassis to be altered were not available when, in fact, they were already on the premises of Batavia, due to lack of coordination of information between the Bureau of Ordnance and Chemical Warfare Service;

(c) Misunderstanding with the Army Engineer Corps, centering around identity of names of Batavia Metal Products, Inc. of Batavia, Illinois, and Batavia Metal Products, Inc., of Batavia, New York;

(d) The War Manpower Commission's lowering the labor ceilings at Erie Basin and Batavia, which were then being urged by the Chicago Ordnance District and Chemical Warfare Service to speed up production on shells and bombs, having emergency urgent ratings, while it (W. M. C.), was granting increased labor ceilings to factories engaged in civilian production in the same area;

(e) The Chicago Ordnance District's bottlenecking the granting of the "E" award to Batavia for its production record and the subsequent lowering of the morale of the Batavia employees;

(f) The Ordnance Department's disproportionate cutback of Batavia's 8" shell contract, although Batavia (a smaller war plant) had met its monthly production quota, while the Department at the same time gave merely "paper cutbacks" to

larger corporate contractors, whose production records were relatively not as good;

(g) An unprecedented "freeze" order, whereby the Chemical Warfare Service froze certain monies due Erie Basin on its contract termination claims, and the subsequent attempts of the corporate representatives to appeal therefrom.

The motives of the petitioners Garssons and of the other representatives of Erie Basin and Batavia in bringing these discriminatory practices to the attention of May, as Chairman of the House Military Affairs Committee, and the motives of Chairman May in making certain telephone calls, in writing letters and in attending conferences to and with various war department officers were all proper and lawful, as was admitted by the Court in the above quoted charge. Rather than go into an extensive history of the facts, the petitioners cite the following merely as three examples showing the lawfulness and propriety of the so-called "services" performed by May:

1. *Award of contract to Rheem without competitive bidding:* Early in 1944, after being advised that the Chicago Ordnance District was receiving bids for the manufacture of the 100 lb. bomb, petitioner Henry Garsson visited the Chicago Ordnance District on ten occasions and asked for an opportunity to submit a bid on this item (R. 4010-4012). He later learned that the Rheem manufacturing Company, a subsidiary of the Bethlehem Steel Company, had been awarded the 100 lb. bomb *contract without competitive bids,* being sub-

mitted (R. 4012-4013). Having both equipment and manpower available for production, Dr. Garsson reported to the corporation's Washington office the failure of the Chicago Ordnance District to give this contract out on a competitive basis. The Washington office informed May that the discrimination he had previously discussed in March 1943 with General Campbell, Chief of Ordnance, still continued, and that the award of the 100 lb. bomb contract to Rheem without competitive bids was the latest example (R. 4013). With these complaints in mind, May telephoned General Campbell and General Hayes, both of the Office of the Chief of Ordnance (R. 1578), that although the Chicago District had given Batavia their plans and specifications for the 100 lb. bomb, Batavia, a small company which was set up to do the job, had not even been permitted to submit a bid on the contract which had been awarded to a large company without competitive bidding (R. 1577-1580, 2792-2794) (GE 135, R. 1479-1481)[3].

2. *War Manpower Commission's reduction of labor ceilings at Erie Basin and Batavia:* Erie Basin and Batavia had contracts to make 8" shells and incendiary bombs, both of which had emergency urgent ratings and 4.2 shells and fuses also critical items and were receiving from Chemical Warfare Service and Ordnance demands to speed up war production in the fall of 1944 (DE 218-220, 211, 296-308, 310, 313, 319, 323, 49 326, 328)[4]. The War Manpower Commission

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[3]The designation "GE" refers to Goverment's Exhibit.

[4]The designation "DE" refers to Defendants' Exhibit.

and the Local Labor Management Committee issued orders conflicting with the Ordnance Department and Chemical Warfare Service. Not only did they reduce labor ceilings at Erie Basin and Batavia below the amount of employees actually employed, but they also permitted utilization of labor at other plants for the manufacture of civilian goods in the same area.

Appeals were taken first in the Chicago District (DE 322, R. 4082, 4153-4158). Thereafter, Dr. Garsson referred these problems to the firms' Washington office and asked it to bring this situation to the attention of the Washington office of War Manpower Commission. At the same time letters and telegrams were sent to Under Secretary of War Patterson, Gen. Lucius Clay, Gen. Campbell and others. All the problems involved, including War Manpower Commission's permitting other plants to use labor for civilian production while Batavia and Erie Basin were being urged by the Ordnance District to speed up production, were brought to the attention of May by letter and telegram in his capacity as Chairman of the House Military Affairs Committee (DE 190-193, 325; R. 4068, 4069, 4112-4116, 4119, 4141, 4142, 4148, 4160, 4164, 4167, 4170; R. 2805-2811, 2816-2818, 2828, 2830, 2987-2992). Chairman May thereupon made the telephone calls mentioned in the indictment—only after he had received from the corporation's Washington representatives all the details of the difficulties between these plants and War Manpower Commission and the Labor Management Committee in the Chicago District (R. 1669-1670, 2806, 2808, 2811, 2986-2987, 2989-2992; DE 220, R. 4069, 4140).

3. *Batavia's actual 8" shall contract cutback as opposed to "paper" cutbacks given larger contractors:* At a conference of 8" shell contractors held in Cincinnati, Ohio, May 3, 1945, Gen. Hardy, in charge of the Ammunition Division, Office of the Chief of Ordnance, announced that cutbacks on 8" shell contracts would be based primarily on actual production (R. 4199-4209). Dr. Garsson, after learning that competitors had been receiving paper cutbacks, on May 7, 1945 wrote Gen. Hardy comparing Batavia's cutback with that of other contractors, and pointed out that Henry Kaiser Company, Rheem Manufacturing Company and Budd Wheel Company, large companies with larger contracts, none of whom had performed its contracts as well as Batavia (which had an excellent production record) had not really received actual cutbacks but "paper" cutbacks. Dr. Garsson sent a copy of this letter and reported this situation to Batavia's Washington office (DE 47, R. 4206, 4207, 4209-4212; R. 4202-4203). The Washington office thereupon presented these facts to May as a matter that should be brought to his attention as Chairman of the House Military Affairs Committee (R. 4214). May thereupon made the telephone calls in which he inquired from the War Department whether they countenanced the discrimination thus shown by Ordnance against Batavia, a small company.

Neither May nor the War Department did anything further in connection with these three instances to correct the discrimination or abuses complained of. The telephone calls May made in connection with the instances above cited constitute fourteen overt acts of

the thirty-five overt acts contained in the indictment. Most of the other overt acts are the result of similar occurrences. These alleged overt acts were relied upon by the Government as proof of the alleged conspiracy as no other proof was presented showing the existence of such a conspiracy. The Government introduced no evidence that any contract was obtained through May by any corporation with which the petitioners Murray W. Garsson and Henry M. Garsson were connected. When the defense sought to show how each contract was obtained the Trial Court did not permit the evidence to be introduced and stated that the Government had not proved that any contract had been obtained through the intervention of May, and that it was therefore not necessary to disprove what had not been proved.

Cumberland Lumber Company: The most controversial point in this case was the status of the Cumberland Lumber Company. The Government charged that certain payments were made indirectly to May through the medium of a corporation, the Cumberland Lumber Company, which was organized and operated for the alleged purpose of concealing payment (App. 5-6). The evidence showed that Freeman, as an employee of Batavia and Erie Basin, sought May's advice as to possible sources of lumber, then a critical item, and that May was not only anxious to promote the war effort by securing new sources of lumber, but was also anxious to foster a new industry in his own district and to afford employment for his constituents (R. 2473-2474); that May assisted in the negotiation and opera-

tion of the lumber tracts owned by the Cumberland Lumber Company; that the Cumberland Lumber Company was organized, owned and controlled by the petitioner, Henry M. Garsson. An impression was left among certain persons that May was the owner of Cumberland Lumber Company. May did not attempt to disspell this impression in order to obtain the cooperation of the residents where the project was located, and to obtain labor to work on the tract, as he realized that a foreign corporation, particularly one owned by a Jew, would have difficulty in obtaining help and cooperation (R. 2556-2558). The statements and letters which may have served to create this impression were made in the absence of and without the knowledge or authority of either of the other defendants. All the documentary evidence established that the ownership of Cumberland Lumber Company was in petitioner Henry Garsson.

The evidence showed that certain amounts were advanced by Erie to the Garssons (GE 1, 2, R. 812) so as to be available for use by Cumberland Lumber Company, and certain other amounts were advanced by Erie and Batavia directly to Cumberland (GE 34, R. 820; GE 1718, R. 185, 192; GE 8, R. 843; GE 11, R. 3029-3030; GE 12, R. 26; GE 14, 15). These advances were regular and in the due course of the firms' business. The money was used by Cumberland to buy a timber tract and set up a lumber mill. Finally, in April 1946, when Cumberland Lumber Company sold the tract involved and the mill, for the sum of $40,000.00 it gave Batavia Metal Products $15,477.00 (DE 42, 43) in full

payment of the advances made to it for lumber and the sum of $23,000 to Erie Basin (DE 266) in partial payment for advances made. All the dealings between May, the Garssons, Erie Basin and Batavia were open and in the regular course of business. There is no evidence of any secret arrangements between any of the parties.

The Government in its case in chief adduced testimony that certain checks payable to Cumberland Lumber Company had been deposited by May either in the Cumberland Lumber Company account at the Prestonsburg Bank, Kentucky, or in May's personal account at said bank (GE 17, 18, 8, 21, 28, 12, 29, 20, 6, 23, 14, 24, 15, 25). Two statements, showing the receipt and disbursements by May of funds belonging to the Cumberland Lumber Company, the deposit of the proceeds thereof in the corporate account at Prestonsburg, and in his individual account at said bank, and the use of all these funds in behalf of the corporation, were introduced into evidence and were *uncontradicted* (DE 114, 202). In these statements May accounts for each and every cent received by him for the benefit of the Cumberland Lumber Company.

The District Court acknowledged that May had a right to be in the Cumberland Lumber Company. It so instructed the jury at (R. 6979):

> "He had a right to be in business. He had a right to be in the Cumberland Lumber Company. He had a right to do all these things. In and of themselves there is nothing wrong with them, but

they are all wrong if they did it for compensation and the Government would only have to satisfy you that he did one of those things if you believe there was this illegal agreement. It is not necessary to prove them all."

The Court of Appeals in affirming the judgment countenanced the conviction of these petitioners under 18 U. S. C. A., Section 203 that the jury were satisfied merely that May received monies for whatever services he performed in behalf of the Cumberland Lumber Company. Both May and Henry Garsson denied specifically that any money was retained by May for his own benefit or that any payment was made to May for services. Both also deny that there was any agreement to pay for services. The Government presented no evidence of such an agreement.

The District Court's denial of motions made in advance of the trial: Petitioners Murray W. Garsson and Henry M. Garsson made a motion to dismiss Count I of the indictment as being duplicitous and invalid under Rule 8 of the Federal Rules of Criminal Procedure, since it charges more than one offense (App. 30, 31). This motion was denied without opinion (App. 97).

Petitioners Murray W. Garsson and Henry M. Garsson moved to dismiss Count I of the indictment on the ground that one of its objectives was merged into the substantive offenses charged in Counts II, III, and IV (App. 30, 31). This motion was denied without opinion (App. 97).

Summary Statement of Facts and Matter Involved

Petitioners Murray W. Garsson and Henry M. Garsson moved to dismiss Counts II, III and IV of the indictment on the ground that petitioners could not be charged as aiders and abettors under U. S. C. A., Section 203 on the ground that offenses under this Statute could only be committed by a Congressman (App. 30, 31). The Trial Court denied the motion without opinion (App. 97).

Petitioners Murray W. Garsson and Henry M. Garsson made a motion to dismiss Counts III and IV on the ground that they were duplicitous since they charged both direct and indirect receipt of compensation, and that the charges in Count IV include all of the charges contained in Count III (App. 30, 31). This motion was denied without opinion (App. 97).

Petitioner Henry M. Garsson made a motion before the start of the trial for dismissal of the indictment against him on the ground that he was entitled to immunity from prosecution, having testified before a Congressional Committee under subpoena and under claim of privilege (App. 31). This motion was made and argued before the District Court supplementing a motion to dismiss the indictment on the ground that the evidence adduced before the Congressional Committee was used directly and indirectly in the Grand Jury. Under this motion petitioner claimed that he was entitled not only to complete immunity, but in addition, all of the evidence which the Government used before the Grand Jury, and would be able to use at the trial itself, was obtained by the Government as a result of the

testimony of Henry M. Garsson before the Congressional Committee (Transcript of Testimony, Apr. 9, 1947). The District Court denied these motions without opinion (App. 97).

Before the trial, petitioner Henry M. Garsson made a motion in the District Court to suppress certain evidence including stenographic notebooks on the ground that they had been illegally seized without a search warrant (App. 42, 48, 83, 90). He testified that these papers including the notebooks were his personal property, and that all of the other articles seized at the same time were returned to him by order of the District Court. The Government presented no evidence contradicting these facts. The motion was denied without opinion by the District Court (App. 97), and the stenographic notebooks were subsequently introduced into evidence by the Government and played an important and substantial part in the case. The denial of this motion is one of the decisions of the trial court which is the subject of this appeal and was contained in the appeal to the Court of Appeals.

Petitioners Murray W. Garsson and Henry M. Garsson, before the trial, made a motion to dismiss the indictment on the ground that the petitioners were indicted by an illegally constituted Grand Jury because over one-half the members of the Grand Jury were Government employees, some of whom were employees of a department directly affected by the prosecution, and which had participated in the investigation and in the Grand Jury hearing, that one of the employees was

an attorney of law of the District of Columbia, thus disqualifying him from jury service, and that there was no opportunity to challenge any member of the Grand Jury for actual bias (App. 30, 31). This motion was denied by the District Court without opinion (App. 97).

District Court's limitation of defense; refusal of offer of petitioner to corroborate testimony of Henry Garsson and May as to their intent and motives: The District Court excluded any attempt during the cross-examination of the Government's witnesses to show that the defendants contacted May only after they had exhausted every possible source and only after they had advised him of the unfair treatment they had received in the Chicago Ordnance District or in the other Governmental agencies. In addition, the Trial Court excluded the offer on behalf of the defendants (R. 5137) to prove through some twenty witnesses that certain facts existed in the Chicago Ordnance District and elsewhere, which resulted in the unfair treatment to these firms and motivated the contacting of Congressman May. The Court refused this offer because "it unnecessarily prolonged the trial". The Court of Appeals sustained the District Judge's action in thus limiting the attempt of the petitioners Henry Garsson and May to buttress their testimony as to their intent and motives. Petitioners submitted that the action of both the District Court and the Court of Appeals in refusing to permit such corroboration of the statements by Henry Garsson and

May as to their motives amounted to violation of their privilege under the United States Constitution, Amendment 6: "To have compulsory process for obtaining witnesses in his favor."

District Court's refusal to strike from the record testimony relative to discharged defendant Freeman: At the close of the Government's testimony, the Court directed an acquittal of the defendant Freeman. At that time the District Court ordered stricken from the record all testimony of E. D. Feldman and Paul Dickerson relative to Freeman's alleged solicitation and receipt from E. D. Feldman of a $1,000 contribution to the political campaign of May (R. 2096; 2114), and Freeman's alleged statement to Feldman that he intended to solicit a $1,000 contribution from his son Joseph S. Freeman (R. 2104). At the time of the acquittal the District Court refused to order stricken from the testimony any other testimony pertaining to Freeman. Among the items left in the record, was the testimony relative to Freeman's requests to May, and May's inquiries in behalf of Freeman's son, Sergeant A. H. Freeman, and other matters of military personnel. The remaining testimony sought to be stricken was permitted to remain in the record on the theory that it related to joint activity of Freeman and some co-defendant. The basis for thus sustaining the District Court's action falls when it is remembered that the District Court, in directing the acquittal of the defendant Freeman, in effect held that Freeman was not a co-conspirator. The Court of Appeals (Op.

11) further confused Freeman's relationship to the Garssons. In one breath it recognized Freeman as an employee of Erie Basin and Batavia, and next states that sometimes he was in the company of the Garssons and sometimes he was acting in their behalf. Since Freeman was not a co-conspirator his acts and declarations made out of the presence of the other defendants were purely hearsay and inadmissible regardless of whether he was an employee of Erie Basin and Batavia or of the Garssons.

Insufficiency of evidence to prove the conspiracy charged in Count I and the substantive offenses charged in Counts III and IV: At the oral argument of the case, Judge Stephens pointed out the vacuum in the Government's case. The Chief Justice, in effect, asked the Government to point out specifically what evidence it had adduced at the trial to establish the conspiracy charged in violation of 18 U. S. C. A., Sec. 203, and the substantive offenses, *independent* of the acts and declarations of co-conspirators or co-defendants in the absense of the other co-conspirators or co-defendants. Upon the filing of supplemental briefs the Court, in the majority opinion, held that "the conspiracy may be proved by the sum total of the independent acts and declarations of all alleged participants".

The record is blank of any proof of joint activity among May and the Garssons. It is replete with isolated series of acts and declarations by one or the other of the petitioners done or uttered in the absence of the others.

Decision of the Court of Appeals: The Court of Appeals, in the majority opinion, recognized that there was a question as to the validity of the indictment: (a) whether a charge could be brought under the general conspiracy statute to violate both a statute of the United States *and* to defraud the United States; (b) whether the conspiracy charged in Count I was merged into the substantive offenses charged in Counts III and IV because the agreement of two or more persons required to constitute a violation of 18 U. S. C. A. Section 203 was necessary for the completion of the substantive crime, and there was no ingredient in the conspiracy which was not possible in the completed crime; (c) whether the Garssons could be charged under 18 U. S. C. A. Section 550 (1946) with aiding and abetting May in his alleged violations of 18 U. S. C. A. Sec. 203. The Court, in its majority opinion, recognized that some of these questions were not free from doubt (Op. 8), and that "there is some force in appellants' argument" relative to the difference between 18 U. S. C. A. Section 202 and 203.

Stephen, C. J., in the minority Opinion, (Op. 29) stated:

> "The defects which I think exist in the indictment are obviously of substantial character and cannot therefore be disregarded under 18 U. S. C. Sec. 556 (1940) or Rule 52 (a), Federal Rules of Criminal Procedure. A precedent supporting an indictment with such substantial defects should I think not be set."

STATUTES INVOLVED

R. S. 102, *as amended June* 22, 1938, *c.* 594, 52 *Stat.* 942 (2 U.S.C.A., Section 192) reads as follows:

> "*Sec.* 192. *Refusal of Witness to testify*—Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."

R. S. 103, *as amended June* 22, 1938, *c.* 594, 52 *Stat.* 942 (2 U.S.C.A., Section 193) :

> "*Sec.* 193 *Privilege of witnesses*—No witness is privileged to refuse to testify to any fact, or to produce any paper, respecting which he shall be examined by any committee of either House, upon the ground that his testimony to such fact or his production of such paper may tend to disgrace him or otherwise render him infamous."

R. S. 859, *as amended June* 22, 1938, *c.* 594, 52 *Stat.* 943 (28 U.S.C., 634):

> "*Testimony of Witnesses before Congress*—No testimony given by a witness before any com-

mittee of either House, shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege."

R. S. 5440, (18 U.S.C., 88):

"*Conspiring to commit offense against United States*—If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."

R. S. 1782, *March* 4, 1909, *c.* 321, *Sec.* 113, 35 *Stat.* 1109 (18 U.S.C., 203):

"Whoever, being elected or appointed a Senator, Member of or Delegate to Congress, or a Resident Commissioner, shall, after his election or appointment and either before or after he has qualified, and during his continuance in office, shall directly or indirectly, receive, or agree to receive, any compensation whatever for any services rendered or to be rendered to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party or directly or

indirectly interested, before any department, court-martial, bureau, officer, or any civil, military, or naval commission whatever, shall be fined not more than $10,000 and imprisoned not more than two years; and shall moreover, thereafter be incapable of holding any office of honor, trust, or profit under the Government of the United States."

Act of March 16, 1878, *c.* 37, 20 *Stat.* 30, 28 U.S.C. 632:

"In the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses, and misdemeanors, in the United States courts, Territorial courts, and courts martial, and courts of inquiry, in any State or Territory, including the District of Columbia, the person so charged shall, at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him."

QUESTIONS PRESENTED

1. Whether the facts alleged in Counts I, III and IV constituted any indictable offense:

(a) Whether the conspiracy in violation of 18 U.S.C.A. Section 203 charged in Count I was duplicitous because it in effect charged the defendants with two conspiracies, a conspiracy to commit an offense which is one crime under Section 88, *and* a conspiracy to defraud, which is another crime under Section 88?

(b) Whether, where the agreement of two or more persons is necessary for the completion of the substantive crime defined in 18 U. S. C. A. Section 203, a conspiracy charge under 18 U. S. C. A. Section 88 can be brought where there is no ingredient in the conspiracy which is not possible in the completed crime, and where it is impossible under any circumstances to commit the substantive offense without cooperative action?

(c) Whether, under 18 U. S. C. A. Section 203, which only prohibits a Congressman from receiving or agreeing to receive compensation for services rendered in connection with matters pertaining to the United States, the persons alleged to have given or agreed to have given such compensation to a Congressman can be charged as aiders and abettors in the commission of such offense by the Congressman?

(d) Whether Counts III and IV are duplicitous since they charge both direct *and* indirect receipt of compensation in violation of 18 U. S. C. A. Sec. 203?

2. Whether a witness, who has testified before a Congressional Committee and has claimed his constitutional privilege against self-incrimination (U. S. Const. Am. 5), is entitled to immunity from prosecution in order that the immunity provided under the provisions of R. S. 102 and R. S. 859 may be co-extensive with the immunity guaranteed by the 5th Amendment?

3. Whether the indictment should have been dismissed where more than one-half of the members of the Grand Jury which returned the indictment were Government employees, some of whom were employees of the General Accounting Office, a department directly affected by the prosecution, and where the petitioners had no opportunity to examine said Grand Jury for actual bias?

4. Whether the petitioner Henry M. Garsson was entitled to a return of certain stenographic notebooks and the suppression of evidence derived therefrom where the evidence showed that these and other items were the personal property of the petitioner, stored in a room set aside for his personal use in the warehouse of a custodian, were seized by Government agents under a subpoena duces tecum directed to the custodian and thereafter, with the exception of certain personal notebooks, were returned to the petitioner by order of District Court—in short, may a subpoena duces tecum be used as a search warrant?

5. Whether the acts and declarations made and uttered by the defendant Freeman in the absence of the other defendants without their knowledge, consent or ratification were admissible as against the petitioners herein, where the Court directed a judgment of acquittal to said defendant at the close of the Government's testimony?

6. Whether overt acts, all of which the trial Judge instructed the jury were lawful and proper, and all of which were not of a character that were usually, if not necessarily done pursuant to a previous scheme and plan, could be used as evidence of the corpus delicti of the conspiracy or substantive offenses where there is no independent proof of the corpus delicti of said charges?

7. Whether the conspiracy charged in Count I and the substantive offenses charged in Counts III and IV could be established against any alleged conspirator by evidence of the independent acts and declarations of his alleged co-conspirator done or made in his absence and without his knowledge, consent or ratification?

8. In a prosecution under 18 U.S.C.A. Section 203, where both the congressman and the party accused as an aider and abettor have testified as to their intent and motive, did the District Court's action in excluding evidence proffered to corroborate or buttress the testimony of said parties as to their intent and motives constitute violations of their privilege under the United States Constitution, Amendment 5 not to "be deprived of life and liberty or property without due process of law", and under Amendment 6 "to have compulsory process from obtaining witnesses in his (their) favor"?

9. Where: (a) the charges on which the petitioners were indicted grew out of public congressional hearings, with the attendant nationwide publicity, over a period of two months and continued thereafter to and through the trial; (b) prior to the trial the petitioner Henry Garsson was indicted for perjury for statements alleged to have been made when he appeared voluntarily before the Grand Jury, and during the trial the newspapers headlined the fact that this petitioner, who was about to testify, had been indicted for perjury before the Grand Jury in this same matter; (c) during the trial the Government attorney, on cross-examination of character witnesses in behalf of the petitioner Henry M. Garsson brought out that he had previously been indicted in 1926—twenty years prior thereto—even though he had been subsequently acquitted; (d) during the trial and throughout the charge, the trial Judge ridiculed and minimized the defense; and (e) the Government attorney made prejudicial remarks in the hearing of the jury, assumed prejudicial facts not in evidence, suggested by his questions that statements had been made to him personally out of Court, in respect of which no proof was offered, and accused defense counsel of improper and unethical tactics, did the cumulative effect of the background of the case and of the misconduct of the prosecuting attorney and of the trial Judge deprive the petitioners of the fair and impartial trial to which they were guaranteed under the United States Constitution, Amendments 5 and 6?

10. Whether the Court of Appeals erred in sustaining the District Court's refusal to instruct the jury as requested by the defendants: (a) that since the trial

Court conceded that the thirty five acts alleged in the indictment, as well as the other alleged overt acts brought out during the trial, were lawful and proper, that such overt acts could not be used in establishing the conspiracies charged in Count I or the illegal agreements charged in Counts III and IV; (b) that the jury must not find that May owned the Cumberland Lumber Company from letters written by him, his utterances and his activities, if they believed that such letters, utterances and activities were induced by his desire to promote the successful production of lumber for the war effort, thus ignoring the entire theory of the defense in this case?

11. Whether the Court of Appeals erred in sustaining the District Court's instructions to the jury: (a) inferring that Congressman May would be guilty of having violated the provisions of 18 U.S.C.A., Section 203, if the jury found that May had been paid for work he did for the Cumberland Lumber Company; (b) in giving almost verbatim the Government's request for instruction No. 12, which wiped out the theory of the defense in charging that it was immaterial "whether the matters pending before the Department should or should not be decided favorable to the person in whose interest the Congressman rendered or attempted to render services", and then characterizing item by item, practically all the testimony adduced by the defendants as immaterial; and (c) in generally giving to the jury a confusing, argumentative and contradictory charge and, in effect, charging them that if the defendants had innocent motives they were none the less guilty and if they had guilty motives they, of course, were guilty?

REASONS FOR ALLOWANCE OF WRIT

1. The Court of Appeals, in the majority opinion, in holding valid the Counts I, III and IV of the indictment under which the petitioners were convicted, has severely enlarged and in large degree emasculated 18 U.S.C.A. Sec. 203, as well as 18 U.S.C.A. Sec. 88. The constant contacts between members of Congress and their constituents and parties bringing various problems to them for the correction of discriminatory evils and for the enactment of remedial legislation requires an interpretation of the provisions of 18 U.S.C.A. Sec. 203 by the Supreme Court. The failure of this Court to grant a certiorari in this case and thereafter to decide the applicability of 18 U.S.C.A. Sec. 203 to parties accused as aiders and abettors of a Congressman in the receipt of compensation for services will leave undecided an important question of Federal administration. This case presents general questions relative to the interpretation and construction of 18 U.S.C.A. Sec. 203 and 18 U.S.C.A. Sec. 88 which have not been, but should be settled by this Court.

A. The majority decision of the Court below that the conspiracy charged in Count I of the indictment is not duplicitous and invalid is in direct conflict with Rule (8a) of the Federal Rules of Criminal Procedure since said County charges in effect the defendants with two conspiracies, a conspiracy to commit an offense which is one crime under Section 88, *and* a conspiracy to defraud, which is another crime under Section 88.

Insofar as the majority opinion relied upon the decision in *United States v. Manton,* 107 Fed. 2d 834 (C. C. A. 2d 1938) it is in direct conflict with the decisions of other Courts of Appeals relative to the duplicity of an indictment charging a conspiracy to commit an offense against the United States, *and* to defraud the United States:

United States v. Dembowsky, 252 Fed. 894 (D. C. Mich. 1918);

Sugar v. United States, 252 Fed. 79 (C. C. A. 6, 1918).

B. That the decision of the Court of Appeals in holding that the indictment is not duplicitous because Count I is merged into the substantive offenses charged in Counts III and IV is in conflict with the following decisions of this Court and of other Courts of Appeals which recognized that a conspiracy charge may not be added to the substantive charges where the agreement of two persons is necessary for the completion of the substantive crime and there is no ingredient in the conspiracy which is not possible in the completed crime:

Gebardi v. United States, 287 U. S. 112, 53 S. Ct. 35;

Pinkerton v. United States, 328 U. S. 640, 66 S. Ct. 1180;

United States v. Katz, 271 U. S. 354, 46 S. Ct. 513;

United States v. Dietrich (C. C. A. Neb.) 126 Fed. 664.

The Court in its majority opinion recognized:

> "*The matter is not free from doubt,* but we are of the opinion that the answer is indicated by the decisions in United States v. Holte, Ex parte O'-Leary and Vannata v. U. S."

C. That the decision of the Court of Appeals, in its majority opinion, in holding that the petitioners could be charged under 18 U.S.C.A. Sec. 550 with aiding and abetting May in his alleged violation of 18 U. S. C. A. Sec. 203 is in conflict with the following decisions in other Courts of Appeals which recognizes that where a statute denounces an act as criminal, but does not penalize the conduct of the necessary participant in that criminal act, that the participant may not be held guilty as an aider or abettor:

Gebardi v. United States, 287 U. S. 112, 53 S. Ct. 35;

Lott v. United States (C. C. A. 9), 205 Fed. 28.

D. That the decision of the lower Court does not give proper effect to Federal Rule of Criminal Procedure 8(a) in holding that Counts III and IV are not duplicitous in charging both direct and indirect receipt of compensation.

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2. That the decision of the Court of Appeals in holding that Petitioner Henry Garsson was not entitled to immunity from prosecution under R: S. 102 and R. S. 859 in return for his testimony under subpoena and under claim of privilege before a Congressional Committee is in direct conflict with the decisions of this Court and of Courts of Appeals of other circuits rela-

tive to the necessity of the witnesses being given an immunity from prosecution co-extensive with the privilege against self-incrimination contained in the United States Constitution Amendment 5:

Counselman v. Hitchcock, 142 U. S. 547, 12 S. Ct. 195;

United States v. Monia, 317 U. S. 424, 63 S. Ct. 409;

United States v. Andolshek, (C. C. A. 2) 142 Fed. 2d 503.

The decision of the lower Court is in conflict with the decision of this Court in Smith vs. United States, at No. 292 October Term, 1948, decided May 31, 1949 (U. S. Supreme Court Bulletin, Vol. 9, p. 1615). In the Smith Case, this court approves the rulings in the Counselman and Monia Cases and disapproves the ruling in the Heike Case.

It is necessary that a definitive opinion be given by this Court on the question of the extent of immunity from prosecution given to witnesses before Congressional Committees under subpoena and under claim of privilege in order that the evil designed to be corrected by statutes pertaining to congressional investigations may be accomplished.

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3. The decision of the Court of Appeals in holding that the Grand Jury which returned the indictment in this case was legally constituted, overlooks and leaves unanswered the precise question whether Federal and District of Columbia Government employees are eligible to serve as *grand jurors* where no opportun-

ity for examining them as to "*actual bias*" has been afforded the defendants and where the offenses charged involve only the Federal Government. This Court has never decided the question thus presented. This is an important general question of Federal law which has not been decided and should be settled by this Court. In view of the fact that so many prosecutions are brought in the District of Columbia for violations of the United States Criminal Code and the difficulty of securing a jury composed of non-Government employees, it is important that defendants be given an opportunity to examine such employees for possible actual bias. This question goes to the very essence of a criminal trial and its resolution will vitally affect the *administration of justice in criminal causes in the District of Columbia.*

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4. This Court has never decided the question whether a defendant is entitled to the return of papers and the suppression of evidence derived therefrom, where such papers were the personal property of said defendant, but were stored in the custody of a warehouseman, were seized under authority of a subpoena duces tecum directed to the warehouseman and, with the exception of certain personal notebooks, were thereafter returned under order of the District Court to the individual defendant.

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5. That the decision of the Court of Appeals in sustaining the District Court's admission of certain hearsay testimony relative to the defendant Freeman,

who was acquitted upon motion by the District Court and thus discharged of any connection as a co-conspirator with the other defendants is in conflict with the following decisions of this Court and of other Courts of Appeal:

Brown v. United States, 150 U. S. 93;
Stager v. United States, 233 Fed. 510;
Pope v. United States, 289 Fed. 312 (C.C.A. 3);

That the admission of the independent acts and declarations of the non-conspirator Freeman, although an employee of the Erie Basin and Batavia Companies, in the absence of and without the knowledge, consent or ratification of the other defendants without independent proof of the existence of the conspiracy or of the commission of the substantive offenses is in direct conflict with the following decisions of this Court and of other Courts of Appeal:

Glasser v. United States, 315 U. S. 60;
Nibbelink v. United States, (C.C.A. 6) 66 Fed. 2d 178;
Minner v. United States, (C.C.A. 10) 57 Fed. 2d 506;
Coplin v. United States, (C.C.A. 9) 88 Fed. 2d 652.

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6. That the decision of the Court of Appeals in holding that the conspiracy charged may be proved by the sum total of the independent acts and declarations of all alleged participants, even though the trial court

instructed the jury that all the acts of the defendants were lawful and proper in and of themselves, is in direct conflict with the following decision of this Court and of other Courts of Appeals, which hold that overt acts in order to be used as evidence of the conspiracy charged must be of a character that are usually, if not necessarily, done pursuant to a previous scheme and plan:

Glasser v. United States, 315 U. S. 60, 62 S. Ct. 690;

United States v. Glasser, (C.C.A. 7) 116 Fed. 2d 690, 700.

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7. That the decision of the Court of Appeals in holding that independent acts and declarations of co-conspirators or co-defendants in the absence of other co-conspirators or co-defendants and without their knowledge, consent or ratification may be used as evidence of the conspiracy is in direct conflict with the decisions of the other Courts of Appeals which hold that such evidence is admissible against the others charged with participating in the conspiracy if it is first shown by independent evidence that the conspiracy existed and that the accused was a party to it at the time the declarations were made:

Nibbelink v. United States, (C.C.A. 6) 66 Fed 2d 178.

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8. That the decision of the Court of Appeals in sustaining the trial Court's exclusion of defendants' offer to corroborate and buttress the testimony of

Congressman May and Henry Garsson as to their intent and motives was in direct conflict with the decisions of other Courts of Appeals which recognize that where the belief of a person or the motive of his act or conduct is material, he may not only directly testify as to his intent, but he may buttress such statement with testimony of relevant circumstances, including conversations had with third persons or statements made by them tending to support his statement that he had no intent to defraud:

Miller v. United States, (C.C.A. 10), 120 F. 2d 968;

C. I. T. Corp. v. United States, 150 F. 2d. 85;

Norcott v. United States, (C.C.A. 9), 65 Fed. 2d 913;

Haigler v. United States, 172 F. 2d 986.

That the lower Court's sustaining of the District Court's action in thus excluding this testimony was a violation of the petitioner's privilege under the United States Constitution, Amendment 5 not to "be deprived of life and liberty or property without due process of law", and under Amendment 6 "to have compulsory process for obtaining witnesses in his favor."

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9. That the cumulative effect of the background of the case and of the misconduct of the prosecuting attorney and of the Trial Judge deprived the petitioners of the fair and impartial trial guaranteed to them

under the United States Constitution, Amendments 5 and 6:

Sunderland v. United States (C.C.A. 8) 19 Fed. 2d 202-216.

10a. That the decision of the Court of Appeals in upholding the Trial Judge's refusal to instruct the jury that overt acts, which are not of a type which usually presuppose a pre-existing conspiracy, could not be used in establishing the conspiracies charged in Count I or the illegal agreements charged in Counts III and IV is in direct conflict with the decision of this Court in *Glasser v. United States,* 315 U. S. 60, 62 S. Ct. 690.

10b. That the decision of the Court of Appeals in sustaining the Trial Judge's refusal to instruct the jury that they must not find that May owned the Cumberland Lumber Company merely from letters written by him, his utterances and his activities, if they believed that such letters, utterances and activities were induced by his desire to promote the successful production of lumber for the war effort is in direct conflict with the decisions of the Courts of Appeals of other circuits which hold that the Court's refusal of instructions excluding or ignoring essential issues or defenses constitutes reversible error:

United States v. International Fur Workers Union, (C. C. A. 2) 100 Fed. 2d 541;

Maran v. United States, (C. C. A. 6) 264 Fed. 768;

Hyde v. United States, (C. C. A. 4) 15 Fed. 2d 816.

11a. That the decision of the Court of Appeals in sustaining the District Court's instruction to the jury that Congressman May would be guilty of having violated the provisions of 18 U.S.C.A. Sec. 203 if the jury found that May had been paid for the work he did for Cumberland Lumber Company, a company which had no business with, or any matters pending before, any Government department, is in conflict with the statute itself and presents a question of substance relating to the construction or application of this statute which has not been, but should be settled by this Court.

11b. That the decision of the Court of Appeals in sustaining the Trial Judge's action after first receiving the Government's requests for instructions subsequent to the commencement of the oral arguments and then advising all parties that he was not going to grant such instruction, in giving almost verbatim the Government's request for instruction No. 12, which wiped out the theory of the defense as to the motives of the defendants and then characterizing item by item practically all of the testimony adduced by the defendants as immaterial, was in conflict with Federal Rule of Criminal Procedure No. 30, and with the decision in *Linn v. United States,* (C.C.A. 2) 251 Fed. 476, 482.

11c. That the Court of Appeals' action in sustaining the Trial Judge's charge to the jury, which, in effect, charged that if the defendants had innocent motives they were none the less guilty, and if they had guilty motives, they of course, were guilty, was in direct conflict with the decision of this Court in *Keegan v. United States,* 325 U. S. 478, 65 S. Ct. 1203.

IMPORTANCE OF QUESTIONS

The Court of Appeal has rendered a decision contrary to the applicable decisions of this Court and of the several Courts of Appeals upon the precise questions herein involved.

The dissenting opinion of Justice Stephens in the Court Below, we submit, correctly states the law applicable to the validity of the indictments in this case.

The questions heretofore stated are questions of grave importance. The Court of Appeals has so far sanctioned such a departure by the Lower Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. One of the important questions is whether the plain language of 18 U. S. C. A., Sec. 203 is to be judicially broadened and in large part strained to bring within its prohibition parties excluded by the provisions of the legislation. In short, many questions of substance relating to the construction or application of 18 U. S. C. A., Sec. 203, have not been, but should be settled by this Court. Judicial recognition of the plain intent of Congress and the preservation of the remedies and safeguards created by it require that the decision of the Court Below be brought here for review.

In addition, the Court Below has not given proper effect to the following applicable decisions of this Court:

Glasser v. United States, supra;

Keegan v. United States, supra;

Brown v. United States, supra;

Gebardi v. United States, supra;

Pinkerton v. United States, supra; and

Krulewitch v. United States, Law Ed. 623 (decided March 28, 1949).

Wherefore, it is respectfully submitted that this Petition for Certiorari should be granted.

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Of counsel for Petitioner:

ALLEN J. KROUSE,
SAMUEL GOLDSTEIN.

June, 1949.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW, JURISDICTION AND STATEMENT OF THE CASE

The opinions below have not been officially reported.

A statement of the grounds on which the jurisdiction of this Court is invoked is set forth in the foregoing petition and is incorporated herein by reference thereto.

A statement of the case, as made in the foregoing petition, is incorporated herein by reference thereto.

ARGUMENT

I.

THE INVALIDITY OF THE INDICTMENT TO CHARGE OFFENSES AGAINST PETITIONER UNDER EITHER 18 U. S. C. A., SECTION 203 OR 18 U. S. C. A., SECTION 88.

A. Count I Charges Duplicitous Offenses: Federal Rule of Criminal Procedure (8a)

The petitioner submits that Count I of the indictment is duplicitous and invalid under Rule (8a) of the Federal Rules of Criminal Procedure since it charges more than one offense. The Court Below misconstrued 18 U. S. C. A. Sec. 88, which is worded in the disjunctive and penalizes a conspiracy *either to commit a violation of a statute* or *to defraud*. As stated by Stephens J. in the minority opinion (Op. 19):

> "I think, therefore, that Count I in effect charges the defendants with two conspiracies, a conspiracy to commit an offense which is one crime under Sec. 88, *and* a conspiracy to defraud, which is another crime under Section 88."

The majority opinion of the Court Below is in direct conflict with the decision in *United States v.*

Dembowski, 252 Fed. 894, 896. In the Dembowski case, in construing the Espionage Act 40 Stat. 219 (1917) 15 U. S. C., Sec. 33, the Court held that the statute created three offenses and that only one such could be charged in a single count. The Court therein held that Congress had in mind in its disjunctive phrasing several distinct evils and that in order to guarantee against all of such evils and the different dangers consequent upon each it prohibited three different kinds of acts. The commission of said acts constituted distinct and separate offenses which could not be joined in one count of the indictment. The minority opinion in the Court Below states that it is clear that Congress in this section had in mind distinct evils with different dangers consequent upon each (Op. 20):

> "A conspiracy to commit an offense against the United States may involve one of many different kinds of offenses denounced by the Federal Statutes, but these offenses may or may not constitute a defrauding of the United States."

Count I does not, as held by the majority opinion, charge one conspiracy as a single offense committed by different acts nor a conspiracy with a multiplicity of objects. It charges the defendants in the language of the statute with having done both of the things forbidden by 18 U. S. C. A., Sec. 88—conspiring to commit an offense against the United States and to defraud the United States. This section thus creates, and Count I, charges, two distinct offenses.

As authority for its decision, the Court stated, "*We think* that the opinion and the decision in the Manton case establishes a rule contrary to this contention". In *United States v. Manton,* (C.C.A. 2, 1938) 107 F. 2d 834, the indictment, drawn under the general conspiracy statute, charged in a single count that the several defendants "conspired to commit offenses against the United States * * * and to defraud the United States" (p. 837). The Court therein relied on *Frohwerk v. United States,* 249 U. S. 204, (1919) in overruling a demurrer attacking the indictment as duplicitous and holding that "the conspiracy is a crime and that is one, however diverse its objects."

However, an analysis of the cases cited in the Manton opinion (the Frohwerk case, *Magon v. United States,* 260 Fed. 811 (C.C.A. 9) and *Anderson v. United States,* 269 Fed. 65 (C.C.A. 9)) shows that the Court did not consider the precise question whether or not 18 U. S. C. A. Sec. 88 contemplates different conspiracies, one to commit the offense against the United States and the other to defraud the United States. As stated by Judge Stephens (Op. 21), if the Court in the Manton case did consider this point, it misinterpreted the statute which, like the statute in the Dembowski case, is disjunctive in meaning and obviously aims at different evils with different consequences.

In addition to being in conflict with the decision of the Court in the Dembowski case, the majority opinion of the Court Below is also in conflict with the decision in *Sugar v. United States,* (C.C.A. 6, 1918)

252, 79. In the Sugar case, involving the validity of an indictment under this same section, the Court of Appeals implied that with the single count there involved *had* charged a conspiracy to commit an offense against the United States *and* to defraud the United States, it would have been duplicitous. In that case the Trial Court and the Court of Appeals both treated the words in the indictment "to defraud the United States" as mere surplusage.

The conflict between the Dembowski and the Sugar cases and the Federal Rule of Criminal Procedure (8a) on the one hand, and the Manton case on the other calls for a construction of the general conspiracy statute on this point by this Court. In Count I of the indictment in the instant case, the acts charged as constituting the offense against the United States and the acts charged as constituting the defrauding of the United States are not the same. In the Manton case the offense charged as the object of the conspiracy was a violation of 18 U. S. C. A., Section 241, 35 Stat. 1113 (1909) which penalizes one who "corruptly or by threats or by force * * * shall influence, obstruct or impede or endeavor to influence, obstruct or impede the different administrations of Justice" in any Court of the United States. The endeavoring charged as the object of the conspiracy was defrauding the United States "of and concerning its right to have the lawful functions of the judicial power of the United States exercised and administered freely from unlawful impairment and obstruction" (107 Fed. 2d, 837). Unlike

the conspiracies charged in Count I of the instant indictment, the acts charged to have been committed under the conspiracy in the Manton case came within both of the denunciations of Section 88—the acts constituted an offense against the United States and a defrauding. They constituted one and the same evil against which Congress sought to guard and the dangers consequent were the same (Op. 21). The Court in the Manton case may have unconsciously treated the second offense, the defrauding of the United States, as surplusage, since the offense alleged to have been committed as the objective of the conspiracy (violation of 18 U.S.C.A., Sec. 241) was in and of itself a defrauding of the United States.

The instruction to the jury that it could convict on Count I if it found that the defendants conspired *either* to violate Section 203 *or* to defraud the United States was prejudicial to the petitioners. The case was not tried on the theory adopted by the Court of Appeals that Count I merely charges a single conspiracy to accomplish two objectives. Had it been, the petitioners would have been entitled to an acquittal unless the jury was satisfied that both objectives were embraced in the conspiracy.

B. The Conspiracy to Violate 18 U. S. C. A., Section 203, Charged as One of Its Objectives, Was Merged into the Substantive Offenses Charged in Counts III and IV.

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1. Danger of use of conspiracy charge as seen in Krulewitch v. United States:

Preliminarily, petitioner calls this Court's attention to the evils of the general conspiracy statute as set forth by Mr. Justice Jackson in *Krulewitch v. United States,* 93 Law Ed. page 623 (decided March 28, 1949).

At page 629, this Court held:

> "* * * However, even when appropriately invoked the looseness and pliability of the doctrine (conspiracy) present inherent dangers which should be in the background of judicial thought wherever it is sought to extend the doctrine to meet the exigencies of the particular case."

The use of this "scatter gun" to bring down defendants gives the prosecuting attorney certain precedural advantages from using it "which add to the danger of unguarded extension of the concept" (p. 630).

One of the evils pointed out by Mr. Justice Jackson is best seen in the instant case — that "the crime is considered so vagrant as to have been committed in any district where any one of the conspirators did any one of the acts, however innocent, intended to accomplish its object. The Government may and often does compel

one to defend at a greater distance from any place he ever did any act because some accused confederate did some trivial and by itself innocent act in the chosen district * * * (630-631). Then Mr. Justice Jackson states on a point which is most material to one of the questions presented in this case (p. 630):

> "* * * Circumstances may even compel the prosecution to fix the place of trial in Washington, D. C., where the defendant may lawfully be put to trial before a jury partly or even wholly made up of employees of the Government that accuses him. Cf. Frazier v. United States, 335 U. S. 497, 93 L. Ed. 175, 69 Supreme Court 201."

Thus the evils of the conspiracy strategy, as seen in the instant case, destroy any chance that the defendants might have to a fair and impartial trial. The "hodge-podge" of the acts and statements by others which the individual defendant never authorized or intended or even knew about made it impossible for the petitioner in this case to make his own case stand on its merits in the minds of jurors as stated by Mr. Justice Jackson (p. 631):

> "* * * the naive assumption that prejudicial effects can be overcome by instructions to the jury, Cf. Blumenthal v. United States, 332 U. S. 539 * * * all practicing lawyers know to be unmitigated fiction."

2. Merger of conspiracy charge and substantive offenses; conflict with decisions in Gebardi v. United States and Pinkerton v. United States:

The question whether the conspiracy charged in Count I to violate 18 U. S. C. A., Section 203 is merged into the substantive violations of Section 203 as charged in Counts III and IV presents a serious question of the construction of this statute which has not been, but should be, settled by this Court. The majority opinion recognizes this problem of construction:

> "* * * *The matter is not free from doubt* but we are of opinion that the answer is indicated by the decision in United States v. Holte Ex Parte O'Leary and Vannata v. United States."

However, a comparison of the conspiracy to violate Section 203 as charged in Count I with the substantive violations of Section 203 charged in Counts III and IV proves that the agreement of two or more persons is necessary for the completion of the substantive crimes, and that there is no ingredient in the conspiracies thus charged which is not possible in the completed crime. For this reason petitioners' motion to dismiss the Count because of the merger of offenses should have been sustained by the lower courts. The Court of Appeals in upholding the Trial Court's overruling of plaintiff's motion *has not given proper effect to the following applicable decisions of this Court:*

Gebardi v. United States, 287 U. S. 112;

Pinkerton v. United States, 328 U. S. 640.

Its opinion also is in conflict with the applicable decisions of other Courts of Appeals, *United States v. Dietrich* (C. C. A. Neb.), 126 Fed. 664. These decisions hold that there can be no prosecution for conspiracy between the very persons without whose cooperation there could have been no substantive offense which itself charged was effectuated.

The Lower Court recognized the conflict between the decisions in the Dietrich, Katz, Gebardi and Pinkerton cases and the decisions in the Vannata, O'Leary and Holte cases. In *United States v. Dietrich* (C. C. A. Neb.), 126 Fed. 664, it was held that an agreement between Congress and another, the one to receive a bribe for aiding to procure an office and the other to pay the same, constitutes the substantive offense under 18 U. S. C. A. Section 202 (which punishes both the recipient and the giver) and could not be made the basis for an indictment under the General Conspiracy Statute for conspiracy to commit an offense against the United States. The decisions relied upon by the Lower Court, the Holte, O'Leary and Vannata cases—as explained in the Gebardi case—in no way restrict or even effect the ruling in the Dietrich case. In the Holte case the indictment charged a conspiracy between the woman transported and the male defendant who caused the woman to be transported across the state line for the purpose of prostitution, contrary to the Mann Act. This Court refused the Trial Court's action in sustaining a demurrer to the indictment. Judge Holmes in the majority opinion, held that the woman could conceivably be the motivating force behind her own

transportation for immoral purposes and thus be guilty of the substantive offense itself. Envisaging this extreme situation, this Court held that the woman defendant could be guilty of conspiracy. In reaching this conclusion this Court relied i. a. upon the authority in such cases as *United States v. Stevens,* 44 Fed. 132, 140 (D. Minn. 1890), where it was held that a conspiracy could be charged against several persons including a census enumerator to insert false and fictitious names in the census schedules. As stated by Judge Stephens in the Lower Court (Op. 24):

> "* * * This it will be seen is not in conflict with the theory of the Dietrich decision because the act of inserting a fictitious name in the census schedules could be done by the enumerator himself alone; it did not require concert of action for him to accomplish the act."

The Lower Court (Op. 8) recognized that the violation of the Mann Act in the Holte case — the substantive offenses — might be committed without the woman's consent since violations of this act do not necessarily require concert of action. *Violations of* 18 U. S. C. Sec*tion* 203 *do require a concert of action.*

Neither is the decision in Ex parte O'Leary, wherein the defendants were charged with conspiring in violation of Section 88 to violate 18 U.S.C.A. Section 207 (35 Stat. 1109), which makes it criminal for an officer of the United States to accept a bribe, but does not penalize the giving of the bribe, any authority for the Lower Court's decision on this point. In the O'Leary case the

Circuit Court held that the Holte case had in effect overruled the Dietrich case.

Neither is the decision in the Vannata case any support for a finding that the rule in the Dietrich case had been reversed. At 289 Fed. page 428, the Circuit Court held, in commenting on the Dietrich case, that the doctrine was limited to instances when the alleged conspirators and the necessary participants in the substantive offenses were the same.

Nowhere in the Gebardi case does the Supreme Court overrule the decisions in the Dietrich or Katz cases. In fact, this Court states (287 U. S. 112, 121-122):

> "Congress set out in the Mann Act to deal with cases which frequently, if not normally, involve consent and agreement on the part of the woman to the forbidden transportation. In every case in which she is not intimidated or forced into the transportation, the statute necessarily contemplates her acquiescence. Yet this acquiescence, though an incident of a type of transportation specifically dealt with by the statute, was not made a crime under the Mann Act itself. Of *this class of cases we say that the substantive offense contemplated by the statute itself involves the same combination or community of purpose of two persons only which is prosecuted here as conspiracy.* If this were the only case covered by the act it would be *within those decisions*, which hold, consistently with the theory upon which conspiracies are punished, *that where it is impossible under any circumstances to commit the substantive offense without co-operative action,*

the preliminary agreement between the same parties to commit the offense is not an indictable conspiracy either at common law, or under the Federal statute. See United States v. Katz, 271 U. S. 354, 355, 46 S. Ct. 513, 70 L. Ed. 986; Norris v. United States (C. C. A.), 34 F. (2d) 839, 841, reversed on other grounds 281 U. S. 619, 50 S. Ct. 424, 74 L. Ed. 1076; United States v. Dietrich (C. C.) 126 F. 664, 667." (Italics ours)

In the Gebardi case, this Court recognized the situations envisaged by the Holte case—that criminal transportation under the Mann Act may be effected without the woman's consent as in cases of intimidation or force (with which the Court was not then concerned). This Court assumed, therefore, as was suggested in the Holte case (236 U. S. 145) that the decisions in the Katz and Dietrich cases do not in all strictness apply. This Court rests its decisions not upon the theory of those cases nor upon the related one that the attempt is to prosecute as conspiracy acts identical with the substantive offense, United States v. Dietrich, supra.

In short, the Gebardi case nowhere overrules the decision in the Dietrich case. It does recognize that where it is impossible under any circumstances to commit the substantive offense without concert of action the preliminary agreement between the same parties to commit the offense is not an indictable conspiracy either at common law or under the Federal statutes. Such is the instant case.

The Lower Court in the majority opinion also has not given proper effect to other applicable decisions of

this Court (*Pinkerton v. U. S.*, 328 U. S. 640, 66 S. Ct. 1180) which recognizes (328 U. S. 644):

> "* * * There are, of course, instances where a conspiracy charge may not be added to the substantive charge. One is where the agreement of two persons is necessary for the completion of the substantive crime and there is no ingredient in the conspiracy which is not possible in the completed crime. See United States v. Katz * * * Gebardi v. United States * * * Another is where the definition of the substantive offense excludes from punishment for conspiracy one who voluntarily participates in another crime. Gebardi v. United States, supra * * *."

The petitioner submits that the Lower Court has not given proper effect to the applicable decisions of this Court in the Katz, Gebardi and Pinkerton cases or to the decisions of the Circuit Court in the Dietrich case. Under these cases, it is not legally possible to make the commission of the substantive offense (violation of 18 U. S. C., Section 203) the object of a conspiracy charge. Section 203 requires from its very nature concert of action and agreement between the parties involved. Although the offense is the receipt of compensation by a congressman for services rendered or to be rendered, nevertheless receipt of compensation cannot be accomplished without compensation also being given. Therefore the offense requires concert of action and agreement between the receiver and the giver.

If this Court finds the charge of conspiracy to violate Section 203 does not constitute an indictable offense, it must also reverse its ruling as to the validity of Count I itself. In this case, the trial court — in regarding Count I as not duplicitous — did not remove from the jury's consideration the charge of conspiring to violate Section 203. On the contrary, trial judge instructed the jury that:

> "If you believe that the defendant is conspiring to defraud the United States *or* to violate Section 203 of the title, 18 U. S. Code * * * and committed one or more of the overt acts to affect the object of the conspiracy * * * you should convict the defendants * * *."

As stated by Stephens, C. J. (26):

> "But in the instant case, in view of the disjunctive phrasing of the instruction, the jury might well have found the defendants guilty under only the charge (of conspiring to conspire) i. e., of conspiring to violate Section 203 '(contained in the surplusage)', and on that basis have convicted them of some change, as pointed out in Topic 2 at no offense. That being so, the submission to the jury of that portion of Count I of the indictment, should, in my view, be held to have been prejudicial to the defendants. I think that it cannot be treated as surplusage and the defect of the duplicity of Count I be thus cured."

Under the decisions in *Stromberg vs. California,* 283 U. S. 359; *Williams vs. North Carolina,* 317 U. S.

287; *Haupt vs. U. S.*, 330 U. S. 631-641, N.1, a verdict cannot stand when the jury was permitted to find it on a ground which should not have been submitted to it.

C. That the Petitioners Could Not Be Charged as Aiders and Abettors to Congressman May under 18 U.S.C.A., Section 203.

Petitioner submits that the Lower Court, in its majority opinion, has decided a question of general importance, as well as a question of substance relating to the construction or application of a statute of the United States, which has not been, but should be, settled by this Court — whether the alleged payors of compensation to a Congressman for alleged services may be charged as aiders and abettors under 18 U. S. C. A., Sec. 203. In addition, the Lower Court has not given proper effect to applicable decisions of this Court and of other Courts of Appeals on this question:

Gebardi v. United States, 287 U. S. 112, 53 S. Ct. 35;

Lott v. United States (C. C. A. 9), 205 Fed. 29.

Petitioner submits that he and Murray Garsson could not be charged (in Counts III and IV) as aiders and abettors to the commission of the substantive offenses of receiving or agreeing to receive a bribe by Congressman May under 18 U. S. C. A., Sec. 203. Section 203 punishes only a Congressman who accepts compensation for services in matters pending before a

Government Department. No reference is made to the payor of the money. The Lower Court expressly recognized that the receiver "alone could commit the statutory offense" (Op. 8).

The Lower Court further recognized that in the Gebardi case there was some support for the petitioner's position that the law is well settled that where a statute denounces an act as criminal but does not penalize the conduct of a necessary participant in that criminal act, the participant may not be held guilty as an aider or abettor (Op. 9). In the Gebardi case at 287 U. S. 119, citing Lott v. United States, supra, this Court stated:

> "* * * we cannot infer that the mere acquiescence of the woman transported was intended to be condemned by the general language punishing those who aid and assist the transporter, any more than it has been inferred that the purchaser of liquor was to be regarded as an abettor of the illegal sale."

The Lower Court not only overlooked the applicable decision in the Gebardi case, but also the decisions in Lott v. United States, supra, and *United States v. Canella* (D. C. Cal.) 63 Fed. Supp. 377. In the Lott case, the statute prohibited the sale of liquor to an Indian but did not make the purchase criminal. It was held that the Indian purchaser could not be validly charged with aiding and abetting the sale of liquor to him. This decision was based on the theory that although the Indian was a necessary participant in the act made illegal, he was absolved by the statute of any

liability for his participation therein — by the very omission of the statute to make his participation criminal. At 205 Fed. 29, the Court stated:

> "* * * the offense is committed only by the vendor or someone who aids him in selling, and that the purchaser and those who aid him in the purchase are not guilty of aiding or abetting in the commission of the offense (the offense being the illegal sale)."

The Lower Court also overlooked the decision in United States v. Cannella, supra, a prosecution under 18 U. S. C., Sec. 207 (Act of March 4, 1909, Chapter 321, Sec. 117, 35 Stat., 1109). The District Court held that the aim of Sec. 207 was to punish officers of the United States for accepting bribes. The Court stated:

> "An offense can only be cimmitted by one who is such an officer, or who is acting for or in behalf of the United States in any official capacity."

The Court further held that the givers of the bribes are not punishable under Section 207, but under 18 U. S. C. A. 291

Congress, by the clear language of Sec. 203 has evidenced its intention that persons alleged to have given compensation to a Congressman should go unpunished. Like the statutes involved in the Gebardi and Lott cases, Sec. 203 does not make the other necessary participant's act in the criminal act — the giving of compensation to a Congressman — a criminal act in itself. The evil sought to be eliminated is the receipt by

a Congressman of compensation for services. There is no more basis for holding one alleged to have given a Congressman compensation for services guilty as an aider or abettor, than there was in the Lott case to have held the purchaser of the illegally sold liquor guilty as an aider and abettor of the illegal sale.

The Court in its decision that the Garssons could be charged as aiders and abettors under Sec. 203 overlooked that the penal provision of said Section is applicable only to a Congressman convicted of receiving compensation. The penalty imposed for violation of this Section is dual: Not only is a Congressman subject to "fined not more than $10,000 and imprisoned not more than two years", but (it is further provided) "*and* shall *moreover,* thereafter be incapable of holding any office of honor, trust and profit under the Government of the United States". Clearly such additional penalty could not be imposed upon parties alleged to have paid such Congressman if they were charged as aiders and abettors.

The Lower Court (Op. 10) recognized that: "There is some force in appellants' argument" relative to the difference between Sections 202 and 203 of Title 18. Section 202 makes criminal offenses of *both* the payment and the receipt of bribes. Section 203 makes *only the receipt* of compensation an offense. The Court stated that "if the two sections had been adjoining sections in the same original Congressional Enactment there would have been great force in it." The Lower Court apparently believed that Congress, when it enacted Section 203, must be taken to have had the

general aiding and abetting statute in mind, that statute being then in existence and, further, must have intended that the giver of compensation to a Congressman should be punished criminally as an aider and abettor. The Lower Court (Op. 10) stated that it was unreasonable to assume "that Congress, being fully aware of the general law on aiding and abetting knew that when it made receipt of compensation a criminal offense, it independently made the payor guilty because the payor certainly aids and abetts the receipt. However, as pointed out by Judge Stephens in the minority opinion (Op. 27):

> "* * * But this argument fails since it seems clear that Congress did not have the general aiding and abetting statute in mind when it enacted Section 203, since at the time — March 4, 1909 — it enacted also Section 202, which makes criminal the giving of a bribe. Had Congress at that time had the general aiding and abetting statute in mind it would have been unnecessary to make criminal the giving of a bribe a crime as Congress did in Section 202. * * *"

The Lower Court overlooked the historical background of Section 203. At the time the original statute, making it criminal for a Congressman to receive compensation, was passed by (Act of June 11, 1864, c. 119, 13 Stat. 123) there was no general aiding and abetting statute in existence. At the time the original statute was enacted, Congress clearly did not intend that the giver of compensation to a Congressman should be

criminally liable as an aider and abettor under the provision of said statute.

Certainly the primary purpose of Congress in the enactment of Section 203 was to safeguard the integrity of the public administration and to make penal acceptance by the public officers named therein, which would result in corruption in Government: See *United States v. Reisley* (D. C. N. J.), 35 Fed. Supp. 102. The public policy involved in protecting the integrity of members of Congress is much more important than the public policy involved in adultery or liquor cases where it has been held that certain active participants — the woman in the adultery case and the purchaser in the liquor case—cannot be charged as aiders and abettors. Therefore, it is submitted that Counts III and IV of the indictment are defective as against the Garssons because they could not be charged as aiders and abettors to May in the receipt of the alleged compensation under Section 203.

The conflict in the construction and the applicability of Section 203 to the givers of the alleged compensation presents a problem of statutory construction which should be decided by this Court.

D. That Counts III and IV Are Duplicitous Since They Charge Both Direct and Indirect Receipt of Compensation.

The Lower Court (Op. 9), in finding no substance in the petitioner's argument that Counts III and IV

are each duplicitous because they charge that May received "directly and indirectly" compensation from the Garssons for services rendered, and that the Garssons aided and abetted the direct and indirect receiving, overlooked Federal Rule of Criminal Procedure 8 (a). This rule clearly prohibits the inclusion of two separate offenses in a single count in an indictment. The charge that May received payment of compensation directly and indirectly clearly alleged two separate offenses under Section 203, since this statute is drawn in the disjunctive.

The decision in *Egan v. United States,* 52 App. D. C. 384, 287 Fed. 958, cited as authority by the Lower Court, was decided before the adoption of the Federal Rule of Criminal Procedure and is clearly in conflict with the provision of Federal Rule 8 (a). The Petitioners submit that this Court should take jurisdiction of this case for the reason that the Lower Court has not given proper effect to the applicable Federal Rule of Criminal Procedure promulgated under authority of this Court.

Conclusion as to Defects in Indictment: That the petitioners were prejudiced by the defects in the indictment is seen in Judge Stephens minority opinion:

> "The defects which I think exist in the indictment are obviously of substantial character and cannot therefore be disregarded under 18 U. S. C. Sec. 556 (1940) or Rule 52(a), Federal Rules of Criminal Procedure. A precedent supporting an indictment with such substantial defects should I think not be set."

II.

THAT PETITIONER, HENRY GARSSON, HAVING TESTIFIED BEFORE A CONGRESSIONAL COMMITTEE UNDER SUBPOENA AND UNDER CLAIM OF PRIVILEGE, WAS ENTITLED TO IMMUNITY FROM PROSECUTION.

The petitioner submits that the lower court has decided a question of general importance, as well as a question of substance relating to the construction of the Fifth Amendment to the United States Constitution and of R. S. 102 and R. S. 859, statutes of the United States, relative to a witness's privilege against self-incrimination, which have not been, but should be settled by this Court. Also, the Court below has not given proper effect to the applicable decision of this Court in *Counselman v. Hitchcock*, 142 U. S. 547, 12 S. Ct. 195.

The Lower Court found that petitioner "did not mention the point (claim of immunity), in any of his Motions to Dismiss for judgment of acquittal, etc." (Op. 4). Petitioner submits that this point was raised in his Motion to Dismiss the indictment (Reason 1 and 2) and specifically in the oral argument on the motions held on April 9, 1947. Petitioner's counsel orally argued that he was immune from prosecution by reason of having been compelled to testify before the Senate Committee Investigating the National Defense Pro-

gram, Sitting in Executive Session, in June, 1946. At the oral argument, there was testimony that at the time petitioner appeared before the Committee, he did so in response to a *subpoena* and that, when asked by Senator Mead whether he waived his Constitutional rights, the petitioner answered, "I am here in response to a subpoena and I do not waive any of my Constitutional rights." (Transcript of testimony, April 9, 1947.)

The petitioner submits that having so testified before the Committee, he was either immune from prosecution or entitled to have barred from evidence any material obtained by the Government as a result of his testimony (Op. 3-5).

R. S. 102 (2 U. S. C. A., Section 192) makes it a criminal offense for a witness to refuse to testify before a Congressional Committee. R. S. 103 (2 U. S. C. A., Section 193) deprives such a witness of the right to claim the privilege against self-incrimination. R. S. 859 (28 U. S. C. A., Section 634) bars the use in criminal proceedings of testimony given by a witness before such Committee.

The court below ruled that petitioner was not immune from prosecution on the authority of the decisions in Counselman v. Hitchcock, supra; *In Re Chapman,* 166 U. S. 661; *Heike v. United States,* 227 U. S. 131; *McGrain v. Daugherty,* 273 U. S. 135; *United States v. Monia,* 317 U. S. 424; *Glickstein v. United States,* 222 U. S. 139; and *Brown v. Walker,* 161 U. S. 591. Petitioner submits that the lower court, in its ruling of this point, has not given proper effect to the

applicable decision of this Court in Counselman v. Hitchcock and to the construction of the Fifth Amendment to the United States Constitution. The cases cited by the lower court do not involve the construction of the provisions of R. S. 859, R. S. 102 and R. S. 103 and in consequence, immunity from prosecution given to witnesses who testified before Congressional Committees.

The constitutionality of the statutes herein involved was never directly passed on in any of said cases. In In Re Chapman, an attempt was made to have this Court pass upon the question, but the Court refused to do so. The Chapman case merely holds that R. S. 102 making it a misdemeanor for any witness summoned by authority by either House of Congress to give testimony or produce papers upon "any matter under inquiry before either House or any Committee thereof, * * * *" is not so connected with R. S. 103, which decrees that such witnesses are not privileged to refuse to give testimony on the ground that it may tend to disgrace or render them infamous that, if the latter section be upheld Constitutional, the former must fall with it.

The lower court's opinion is thus summarized:

(1) that R. S. 859, R. S. 102 and R. S. 103 afford no immunity and merely a qualified immunity to one who is compelled to testify thereto; and (2) that, therefore, if the petitioner wanted to claim any immunity independent of the statute (under the Fifth Amendment) he should have specifically refused to answer each and every question put to him which might tend to

incriminate him. As to the first basis of the court's opinion, it clearly appears from the mere reading thereof that if such were the case, the statutes would be unconstitutional. Unless the three statutes taken together actually give immunity, then no compulsion can be exercised by the witness and he is free to refuse to testify. R. S. 859 would be unconstitutional as merely providing a qualified immunity in consistence with the Fifth Amendment: Counselman v. Hitchcock, supra. R. S. 102 would be unconstitutional because it would afford no immunity at all and, at the same time, subject the witness to fine and imprisonment for refusal to comply therewith.

Construing either or both statutes as constitutional, the petitioner submits that absolute immunity from prosecution is given to a witness who is compelled to testify before a Congressional Committee. Even if these statutes are read separate and independent of each other, in order to sustain the constitutionality of R. S. 102, it is necessary that a grant of implied absolute immunity from prosecution must follow from the fact that it compels appearance and testimony under threat of fine and penalty for commission of a misdemeanor.

Petitioner submits that it is unnecessary to decree said statute unconstitutional on the ground that otherwise the evidence given before the Committee was illegally obtained under compulsion of unconstitutional statutes and, therefore, could not be used in any action to which he is a party. An Act of Congress will not be held to be unconstitutional if it will admit of any constitutional interpretation. See *Epstein v. Helvering* (CCA 4), 120 Fed. 2nd, 427, where the Court stated:

> "* * * we apply the final cannon which makes it *our duty* of two possible constructions to adopt the one which will serve and not destroy. We cannot attribute to Congress an intent to decide the Fifth Amendment where 'even to come so near to doing so as to raise a serious question of constitutional law.' " (Italics ours)

Relative to the second basis of the lower court's opinion, petitioner submits that it failed to give proper effect to another applicable decision of this Court: *United States v. Monia*, 317 U. S. 424, 63 S. Ct. 409. The lower court's opinion, in short, was not based on its belief that R. S. 859 and R. S. 102 do not afford complete immunity from prosecution to such witness, but is based on the fact that " * * * so far as the record shows, he was not compelled. So we fail to find that an immunity from prosecution was created for him." (Op. 6). That a witness who thus testifies under subpoena need not refuse to answer each question on the ground that it may incriminate him is shown in the following cases:

U. S. v. Monia, supra.

U. S. v. Andolshek (CCA 2) 142 Fed. 2nd 503.

It would be a mockery of the Fifth Amendment to compel the witness to repeat his refusal after each question.

The Lower Court relied largely on *Heike v. United States*, 227 U. S. 131. But there (as was pointed out in the Monia case at 317 U. S. 424), this Court held only that immunity did not extend to a matter other than

that which formed the basis of the orginal inquiry. Here the two matters are identical.

This Court's attention is called to he decision in *United States v. DeLorenzo* (CCA 3), 151 Fed. 2nd 922. In that case, the witness before the Congressional Committee was told that he need not answer if he claimed his privilege. The witness nevertheless did answer. Judge Clark, dissenting, expressed the view that the statute should be interpreted so as to give immunity (because only by such interpretation could the work of investigating committees be facilitated).

These views show a question of general importance relating to the application of the Fifth Amendment and to the construction of R. S. 859 and R. S.102 which have not been but should be settled by this Court in view of the numerous Congressional Investigations. The question here presented is important and novel and should be reviewed by this Court.

Further, petitioner submits that, even if absolute immunity is not afforded, the only reasonable interpretation of R. S. 859 (28 U. S. C. A. 634)—which provides that no testimony given before a Committee may be used as evidence in any criminal proceeding against him in any court, except in a perjury prosecution — is that information given by a witness to a Congressional Committee cannot be used even if it is subsequently obtained elsewhere. To compel the witness to testify on the understanding that his testimony will not be used and then use the information thus obtained to secure verification of it from other sources is an unfair avoidance

by the Government of the spirit of the statute and could not have been so intended by Congress. The statute bars the indirect as well as the direct use of the testimony: *United States v. DeLorenzo,* 151 Fed. 2nd, 125. This is the doctrine of the search and seizure and wire tapping cases; "the fruit of the poisonous tree" (*Nardone v. United States,* 308 U. S. 338). The purpose of giving immunity and promising not to use the testimony is in order to enable Congress to carry out its investigating power without being hampered by reluctance on the part of the witnesses who might otherwise refuse to testify from fear that their testimony can be used indirectly against them, thus *twisting* their Constitutional right of refusal to incriminate themselves.

III.

THAT PETITIONERS WERE INDICTED BY AN ILLEGALLY CONSTITUTED GRAND JURY

That the Lower Court in ruling that petitioners had been indicted by a legally constituted Grand Jury failed to give proper effect to the applicable decisions of this Court in *United States v. Wood*, 299 U. S. 123, 57 S. Ct. 177; and *Frazier v. United States*, 69 S. Ct. 201. Reason 9 of the Motion to Dismiss the Indictment raised the specific question as to whether or not the petitioners had been indicted by a Grand Jury illegally constituted (App. 30). He claimed that over one-half of the members of the Grand Jury were Government employees, some of whom were employees of the General Accounting Office, a department directly affected by the prosecution, having investigated and participated in the Senate investigation and in the Grand Jury hearings. Also one of the employees was an attorney at law of the District of Columbia and disqualified from jury service.

While it is true that under the Act of August 22, 1935, 49 Stat. 682 and the decisions in the Wood and Frazier cases, that the mere fact that Government employees are members of a jury in the District of Columbia is not sufficient to disqualify them, nevertheless the law remains that every defendant is entitled to have his case submitted to an impartial jury (U. S. Const., Amend. 6; D. C. Code 1940, Section 11—1401 et

sec.). Both the Wood and Frazier cases involved the legality of a *trial or petty jury* composed entirely of employees of the Federal Government. In both cases, prospective jurors who were Government employees were *subject to challenge* for actual bias as were all other persons and in the same manner. In the instant case, the petitioners had no opportunity to challenge any members of the Grand Jury for actual bias. As stated by this Court in the *Wood case,* 290 U. S. 123, 57 S. Ct. 177-179, in speaking of the bias which Government employees might have when considering a prosecution affecting the rights of United States:

> "In dealing with an employee of the government, the court would properly be solicitous to discover whether in view of the nature or circumstances of his employment or of the relation of the particular governmental activity to the matters involved in the prosecution, or otherwise, he had actual bias, and, if he had, to disqualify him."

This Court's attention is called to the dissenting opinions by Judges McReynolds, Sutherland and Butler in the Wood case, and by Judges Jackson, Frankfurter, Douglas and Murphy in the Frazier case.

Petitioners submit that the decisions in the Wood and Frazier cases are not controlling in this case. Both cases hold that the mere fact of Government employment without more, would be insufficient under the mandate of the Act of August 22, 1935, 49 Stat. 682 to disqualify a juror. The effect of these rulings was to make Government employees *subject,* as are all other

persons and in the same manner, to challenge for "actual bias" and under ordinary circumstances only to such challenge (299 U. S. at 133, 57 S. Ct. at 179). The petitioners had no opportunity to challenge any of the individual members of the Grand Jury for "actual bias". To argue that they could accomplish this by making and challenging the panel as a whole would contravene the ruling in *Frazier v. United States,* where (69 S. Ct. 209) the Court held:

> "* * * Absent any basis for such challenge we do not see how a right to challenge the panel as a whole can arise from the mere fact that the jury chosen by proper procedures from a properly selected panel turns out to be composed wholly of Government employees or, a fortiori of persons in private employment."

Federal Rule of Criminal Procedure 6(b) (2) is inapplicable to this case. The Lower Court confused *eligibility* of Grand Jurors with the *legal qualification* of such members. Government employees *otherwise qualified according to law,* are eligible. Inasmuch as the petitioners had no opportunity to challenge the members of the Grand Jury for actual bias, the question remains unanswered whether or not the Grand Jurors were legally qualified.

The precise question as to whether or not Federal and District of Columbia Government employees are eligible to serve as Grand Jurors *where no opportunity for examining them as to "actual bias" has been afforded* the defendants, and where the offenses charged

involve only the Federal Government, has never been decided or even raised in this Court. This Court, in *Krulewitch v. United States,* 93 Law Ed. 623 at 631, recognized the danger (especially in conspiracy cases) of a defendant's being put to trial before a jury partly or even wholly made up of employees of the Government that accuses him.

IV.

THAT THE PETITIONER'S PERSONAL PAPERS WERE ILLEGALLY SEIZED IN VIOLATION OF HIS RIGHTS UNDER THE FOURTH AND FIFTH AMENDMENTS

The Lower Court, in its opinion with reference to the petitioner's motion to suppress certain evidence (Op. 67) misapprehended in a material way the facts testified to on this point by the petitioner. The record (Tr. of Testimony April 9, 1947) shows that certain personal papers, including stenographic notebooks hereinafter referred to, which were the property of petitioner, had been set aside in a separate and locked room at the Batavia plant. The contents of the room were specifically marked as his property. Prior to the finding of the indictment in this case, a subpoena duces tecum was addressed to and ordered any officer or agent of the Batavia firm to appear before the Grand Jury at Chicago and bring with him the various items stored in that room, including specifically certain books belonging to Henry Garsson (App. 89). This subpoena was served on one, H. L. Kramer, an officer of Batavia. After Kramer conferred with the attorneys at Batavia, he permitted the Marshal to load on a truck and remove the twenty-one boxes mentioned in the subpoena and to take them back to the District Court. Thus, instead of merely serving the subpoena and permitting Batavia to deliver the documents in the

ordinary course, the agents of the Meade Committee immediately physically took possession of all the material called for by the subpoena (R. 7320-7321). In fact, it was necessary to break open the lock in order to gain entrance to the room thus set aside for the petitioner's use.

At the time the boxes were thus seized this room was on the premises of the petitioner and not those of Batavia. While the representative of Batavia (which was then in receivership) consented to the removal of this material by the agents, there has never been any contention that he had authority to act on behalf of the petitioner.

After the boxes had been delivered to the office of the United States attorney, petitioner applied to the said Court for an order to permit him to get back all the boxes thus removed. The impropriety of this seizure was in effect adjudicated by the District Court at Chicago, which on his petition directed the return to Henry Garsson of the material taken from that room. This order granted him permission to recover these items as his personal property and not that of Batavia. The Government returned everything to him, with the exception of one box which contained the notebook in question (App. 87, 93). The petitioner picked up these items at the District Attorney's office and had them sent to a warehouse for storage in his name.

This petitioner moved the Trial Court for the return of the material thus retained by the Government, specifically including this and other notebooks,

and asked that the use of material derived therefrom be suppressed at the trial (App. 83; R. 7309) on the ground that these constituted his personal property (Tr. of Testimony, April 9, 1947, page 70; R. 7326); there was no evidence to the contrary. The Trial Court without giving any reason, denied this motion (App. 97; R. 7371).

The Lower Court misapprehended the petitioner's testimony relative to the stenographic notebooks being his personal property and not corporate property. The Lower Court stated (Op. 7): "That it showed they related to invoices of Cumberland for the Cumberland Lumber Company, which was corporate business of the Batavia Company and not personal business of Henry Garsson." The uncontradicted testimony at the hearing on the motion before the trial and at the trial showed that the invoices related to Erie Basin's transactions with Cumberland, that they had nothing to do with Batavia, and that they were his personal notes (R. 4460 et seq.). Indeed, in view of the prior determination by the District Court at Chicago that the petitioner was entitled to the return of the material taken from this room, it must be assumed that there was a general finding that this constituted his personal property. The Government did not sustain the burden of showing that the notebooks withheld did not belong to the petitioner.

The invoices related to in the stenographic notes were subsequently put into evidence as Government's Exhibits 104, 106 and 107 and showed on their face that they were invoices from Cumberland to Erie Basin.

As shown in the record, Cumberland Lumber Company was a personal transaction of Henry Garsson and unrelated to Batavia. The Government submitted no testimony to show any relation between these invoices and Batavia.

Petitioner submits that substantial error was committed by the receipt in evidence of this stenographic notebook which contained his personal matters, and which had been thus illegally seized by Federal officers. The contents of the notebooks were used by the Government throughout the trial and this aspect of the case was given great prominence. The jury was specifically asked to look at these invoices and the notebook (R. 5909). They may very well have found this notebook to be the keystone of the Government's whole case against petitioners. In fact, the Trial Court allowed the jury the time to read and compare the stenographic notebooks and the transcripts therefrom. The Trial Court did this with only one or two of the other more than 500 exhibits introduced in the case.

This court has never decided the question whether a subpoena duces tecum served on a warehouseman can be used as a basis for seizure by the Government of personal documents of a defendant in the warehouseman's possession, especially where the warehouseman has set aside a room for storage of such individual property. The evidence on this point was misstated by the Lower Court. The Court Below avoided the legal issue involved by finding that these notebooks were corporate property and not that of the petitioner,

when, as a matter of fact, there was no evidence that they belonged to anybody but Henry Garsson.

Petitioner respectfully submits that the record shows conclusively that the books were his property and had been illegally seized by the United States Marshal from a room set aside for his personal use—without a legal search warrant. A subpoena duces tecum is not a search warrant and does not give authority to make seizures of this nature. The seizure of the stenographic notebook, particularly, was illegal, warranting its return and the suppression of all evidence derived therefrom. Further the illegal seizure constituted violations of this petitioner's privileges under the 4th and 5th Amendments to the United States Constitution.

V.

THAT THE INDEPENDENT ACTS AND DECLARATIONS MADE AND SAID BY FREEMAN, FOUND BY THE TRIAL COURT TO BE A NON-CONSPIRATOR WERE INADMISSIBLE AS AGAINST THE OTHER DEFENDANTS TO PROVE EITHER THE CONSPIRACY OR THE SUBSTANTIVE OFFENSES.

Petitioner submits that the Lower Court erred in sustaining the Trial Court's refusal to strike from the evidence any of the testimony relative to the defendant Freeman who was acquitted at the close of the Government's case. The Trial Court, in directing an acquittal of the defendant Freeman, a fortiori held that Freeman was not a co-conspirator. The Lower Court (Op. 11) confused Freeman's relationship to the Garssons. In one breath it recognized him as an employee of Erie Basin and Batavia. Then it states that sometimes he was in the company of the Garssons, and sometimes he was acting in their behalf. Then again it states he was acting as a Washington representative of the Garsson companies. Petitioner submits that if Freeman was not a conspirator, his acts and declarations made out of the presence of the other defendants, were purely hearsay and inadmissible, regardless of whether he was an employee of these firms or of the Garssons.

The Lower Court, in stating that even if Freeman had never been indicted, that evidence of his activities

as a Washington representative of the Garsson companies would have been admissible (Op. 11), has decided a question of general importance in conflict with the applicable decision of this Court in *Glasser v. United States*, 315 U. S. 60. The Lower Court misapprehends the question of criminal liability of a principal for acts done in his absence and without his knowledge. Surely there is no relationship between Freeman's activities in behalf of his son and the general charges made against the other defendants and Erie Basin and Batavia.

The decision of the Lower Court on this point is in clear conflict with the applicable decision of this Court in Glasser v. United States, which, in effect holds that in order to render admissible even as against one member of an alleged conspiracy the acts and declarations of another, the *existence of the conspiracy charged* and the connection of the conspirators with it *must be shown independently*. However, petitioner submits that since Freeman was acquitted on the charge of conspiracy, even more must be shown by the Government before his acts and declarations could be admissible as against the remaining defendants. To attach criminal liability on a principal for the independent acts and declarations of an agent, made in the absence of and without the consent, authority or ratification of the principle, would warrant a conviction on pure hearsay testimony.

The petitioners join in and incorporate by reference thereto the argument on this point as set forth in the brief of the petitioner May.

VI.

THAT THE COURT OF APPEALS' DECISION RELATIVE TO THE ADMISSIBILITY OF LAWFUL OVERT ACTS TO PROVE THE CONSPIRACY OR SUBSTANTIVE OFFENSES IS IN CONFLICT WITH THE APPLICABLE DECISION OF THIS COURT IN GLASSER V. UNITED STATES.

The Lower Court in deciding that lawful overt acts were admissible to establish the conspiracy and the substantive offenses has failed to give proper effect to the applicable decision of this Court in *Glasser v. United States*, 315 U. S. 60.

Petitioners contend that the evidence of overt acts was inadmissible to prove the conspiracy or substantive offenses. There was no evidence of a meeting of the conspirators, and that the acts, statements and letters of Freeman should have been stricken because Freeman was acquitted for the reason that he was neither a conspirator nor a party to the agreements described in Counts III and IV. The Court of Appeals held that (Op. 11) the evidence showed the receipt of money by May from the Garssons and the performance of services by May, and on this proof alone it was for the jury to determine (1) the existence of a conspiracy, and (2) the existence of the agreements described in Counts III and IV, and also whether the money was

paid as compensation. The Lower Court, in short, held that overt acts, performed out of the presence of the petitioners without their knowledge, consent or ratification were admissible to prove the conspiracy, the petitioners' participation therein, and the agreements described in Counts III and IV. In support of this holding the Lower Court cited:

> *Hoeppel v. United States,* [illegible]pp. D. C. 71, 85 Fed. 2d 235;
>
> *McDonald v. United States,* 77 App. D. C. 33, 133 Fed. 2d 23;
>
> *Pastrano v. United States,* 127 Fed. 2d 43.

The Lower Court, in effect, has held that a conspiracy and the agreements described in Counts III and IV can be established by hearsay overt acts performed in the absence of the other petitioners. Then (Op. 14) it held that there was no evidence of the conspiracy in this case established by declarations, and that the only evidence of the conspiracy *"if there be any"* was in the acts of the defendants, citing with approval *United States v. United States Gypsum Company,* 67 Fed. Supp. 394, 451, and *Glasser v. United States,* 315 U. S. 60. Thus the decision shows on its face that the Lower Court has failed to give proper effect to the applicable decision in the Glasser case for in its opinion (Op. 12) it has held that hearsay acts can be used to establish a conspiracy. The decision in the Glasser case (315 U.S. 60) held that declarations of one co-conspirator in furtherance of the objects of the conspiracy made to a third party over the objection of a co-conspirator who

was not present when they were made were admissible "only if there is proof aliunde that he is connected with the conspiracy * * * otherwise hearsay would lift itself by its own bootstraps to the level of competent evidence". The Court Below thus has failed to give proper effect to the applicable decision of this Court which conditions the admissions of not only acts and declarations of co-conspirators, but also overt acts, upon proof by independent evidence of the existence of the alleged conspiracy.

Further, the Court of Appeals has failed to recognize the applicable decision of the Court of Appeals for the 7th Circuit in *United States v. Glasser,* 116 Fed. 2d 690, which holds that:

> "It is equally true that overt acts of the parties may be considered with other evidence and attending circumstances in determining whether a conspiracy exists. Where the overt acts are of a character that are usually, if not necessarily, done pursuant to a previous scheme and plan, proofs of the acts has a tendency to show such pre-existing conspiracy so that when proven they may be considered as evidence of the conspiracy charged, and if the established facts and inescapable inferences are inconsistent with the accused's professions of innocense, it becomes the problem of the jury to weigh the evidence and determine, under proper instructions dealing with the quantum of proof necessary to convict, the guilt or innocence of the accused."

The overt acts must be of a character that are usually, if not necessarily, done pursuant to a previous scheme and plan in order to be used as evidence of the conspiracy charged. Therefore, the Court Below, in effect, overruled the Trial Court which had charged that all the services alleged to have been performed by May in this were legal and proper (6978-6981). If these services were legal and proper, then they were not of a character that are usually, if not necessarily, done pursuant to a previous scheme and plan.

The decisions, cited by the Lower Court in the Hoeppel, McDonald and Pastrano cases as authority for the decision that evidence of overt acts *generally* are admissible to prove a conspiracy do not support its decision. A conspiracy can be inferred from the fact that two men are found together breaking into a bank, that indubitably proved that they had agreed to commit the burglery. The overt act of the receipt and concealment of smoking opium is proof of a conspiracy to violate the Narcotic Laws (Pastrano v. United States) for such overt acts are unlawful on their face. All the overt acts mentioned in these cases were unlawful on their face and were of a character that are usually, if not necessarily, done pursuant to a previous scheme and plan. Such overt acts were not comparable in nature to the overt acts which the Trial Judge in the instant case held to be lawful and proper.

Petitioners join in and incorporate by reference thereto the argument of petitioner May on this point.

VII.

THAT INDEPENDENT ACTS AND DECLARATIONS OF ALLEGED CO-CONSPIRATORS MADE AND UTTERED IN THE ABSENCE OF OTHER CONSPIRATORS WERE INADMISSIBLE TO ESTABLISH THE CONSPIRACY CHARGED.

At the oral argument before the Court of Appeals, Judge Stephens pointed out the vacuum in the Government's case. Judge Stephens in effect asked the Government to point out specifically what evidence had been adduced at the trial to establish a conspiracy in violation of Section 203 *independent* of the acts and declarations of co-conspirators or co-defendants in the absence of other co-conspirators or co-defendants.

The Court of Appeals again failed to give proper effect to the applicable decision in the Glasser case (316 U.S. 60), when in discussing petitioners' argument that overt acts done in performance of a conspiracy cannot be used to establish the conspiracy itself stating "There is no such rule of law." (Op. 14). The Court confused proof of participation or connection by an alleged conspirator to a conspiracy with the question of proof of the corpus delicti of the conspiracy itself. The Lower Court assumes that the conspiracy has been established. Petitioner does not argue with the Lower Court's holding that the participation of an

alleged conspirator can be proved by his own acts done in the absence of the others or that each conspirator's acts and declarations may be evidence of his own connection with the conspiracy. Petitioner does submit that the Lower Court erred in stating that conspiracy "may be proved by the sum total of the independent acts and declarations of all alleged participants." There is no authority for the Lower Court's decision on this point. The question is one of general importance which has been decided in the Glasser case. By taking the sum total of independent acts and declarations of all alleged participants, the absence of other participants in order to prove the conspiracy itself is doing precisely what is prohibited by the ruling in *Glasser vs. U. S.* (315 U. S. 60, 73, 75). There this Court ruled such evidence occurring out of the presence of other defendants is *hearsay* as to the other defendants and to permit it to be used to prove the conspiracy is to raise hearsay evidence by its "bootstraps" to the level of competent evidence.

All the cases cited by the Court of Appeals as authority for its holding that a conspiracy may "be proved by the sum total of independent acts and declarations of all alleged participants" (Op. 14), are only indicative of its misapplication of the decision of this Court in the Glasser case and on the petitioners' basic argument which was our authority for the petitioners' position on this point. In fact, all of these cases support petitioners' argument that the existence of the conspiracy charged cannot be established against an alleged conspirator by evidence of the acts or declara-

tions of his alleged co-conspirators done or made in his absence (See *Thomas vs. U. S.*, C. C. A. 10, 57 Fed. (2d) 1039, 1041, 1042.)

In *Nibbelink vs. United States,* (C. C. A. 6), 66 Fed. (2d) 178, 179, the Court stated:

> "*Before* the declarations of co-conspirators can be received in evidence against one charged with participating in the conspiracy, *it must be shown by independent evidence that the conspiracy existed* and that the accused was a party to it at the time the declarations were made."

United States v. United States Gypsum Company, (D. C. D. C.) 67 Fed. Supp. 397, 451 et seq. cited by the Lower Court, the Court quotes from *Connecticut Mutual Life Insurance Company vs. Hillman,* 118 U. S. 208, 218, 23 S. Ct. 294, 298:

> "* * * In order to render admissible as against one member of an alleged conspiracy the acts or declarations of another the existence *of the conspiracy charged and the connection of the conspirator with it must be shown independently.*" (Italics ours).

The Lower Court failed to discuss the failure of the Government to show the existence of the conspiracy by proof other than that of the concededly legal and proper overt acts and other than by proof of acts and declarations of alleged co-conspirators and co-defendants made and uttered in the absence of the other defendants. The record shows that there is absolutely

no independent proof of the existence of a conspiracy or the commission of substantive offenses, and that there is no proof of the defendants acting with a concert of action for a common purpose. The Court of Appeals failed to recognize the Trial Court's charge that all the overt acts, in and of themselves, were legal and proper (Tr. 6978-6981).

Although the Court Below states (Op. 14) that "there is also ample evidence of joint activity by the Garssons and May", petitioners submit that the transcript of testimony in this case fails to show any evidence of any such joint activity and shows no independent evidence of a conspiracy or of substantive offenses.

The record is bare of such independent evidence. In fact, the evidence was not sufficient to send the case to the jury and motions for judgment of acquittal should have been granted.

The Court Below misapprehended the defense in this case, when it stated (Op. 13): "Appellants do not contradict the elemental facts that money passed and services were performed." The Court contended that the appellants offered an explanation for many of the transactions and denied all the Government inferred from them. However, petitioners submit that every transaction was fully explained in the evidence and it was specifically shown, *without contradiction,* that no payment of money was given to or recived by May for compensation. Petitioner specifically denied that any moneys were paid to May for compensation and pro-

duced uncontradicted proof that all of the moneys described in Paragraphs 1 through 6 of this section of the Court's opinion were shown to have been disbursed by May for the benefit of the Cumberland Lumber Company and was not retained by him as compensation (DE 114-202).

Petitioners join in and incorporate by reference thereto the argument on this point as set forth in the Brief of Petitioner May. They specifically incorporate the argument based upon the receipt and disbursements by May of certain moneys delivered to him for the benefit of Cumberland and also based upon receipt of moneys received in connection with the so-called "Greenbrier" transaction. He incorporates by reference thereto the argument in opposition to the Government's contention that the Cumberland Lumber was a medium through which May was alleged to have received compensation for services.

With reference to services alleged to have been performed, petitioners submit that they did specifically deny at the trial that services were performed. They tried to prove this point through the twenty-three witnesses whom the Trial Court would not permit them to subpoena. They tried to introduce through May and Henry Garsson further proof that no services were performed and that no contracts were obtained through May. The Trial Court refused to permit this evidence on the grounds that:

(A) The Government had not introduced any evidence that the contracts were received be-

cause of May and that, therefore, it was not necessary to disprove what had not been proved; and

(B) Motive was what counted and not whether services were actually performed.

Petitioners submit that they had no other method of proving intent and motive other than through the testimony of the defendants and the corroborating testimony of the proffered witnesses as to the surrounding circumstances. Therefore, they submit that the Court Below erred in stating that "appellants do not contradict the elemental facts that money passed and services were performed."

The Court Below (Op. 13) stated that "The Government says that the evidence shows the company to have been a sham to cover financial deals between May and the Garssons." The record is again bare of any evidence to prove that Cumberland was a "sham". Both May and Petitioner specifically denied that Cumberland was a medium through which money was passed to May. There would be only two ways of proving that Cumberland was a "sham" as claimed by the Government: (a) direct evidence to that effect, or (b) proof that monies put into Cumberland were not needed for the company but were used by May to enrich himself. There certainly is no direct evidence in this case. As far as circumstantial evidence is concerned the record shows that only such monies were put into Cumberland as were needed for the operation of the business. Shams are proved by using false names as conduits through which money can flow to an undis-

closed person. There is no evidence in this case from which any inference can be drawn to substantiate the Government's claim that Cumberland was a sham.

Therefore, petitioner submits that there was a fatal vacuum in the Government's case to prove the conspiracy and substantive offenses independent of the hearsay testimony as to lawful overt acts and independent acts and declarations of the co-conspirators and that, therefore, the motions for judgment of acquittal should have been granted.

VIII.

THAT THE TRIAL COURT'S REFUSAL TO PERMIT CORROBORATION OF TESTIMONY OF MAY AND HENRY GARSSON AS TO THEIR MOTIVES AND INTENT CONSTITUTED VIOLATIONS OF THEIR PRIVILEGES UNDER UNITED STATES CONSTITUTION, AMENDMENTS FIVE AND SIX

The Trial Court excluded any attempt, during the cross-examination of the Government witnesses, to show the petitioners contacted May only after they had exhausted every possible source and only after they had advised him of the unfair treatment they had received in the Chicago Ordnance District and in the other Government agencies. In addition, the Trial Court excluded an offer on behalf of all petitioners (R. 5137) to prove through some twenty (20) witnesses that certain facts existing in the Chicago Ordnance District and elsewhere resulted in unfair treatment of these firms and consequently motivated the contacting of Chairman May. The Court refused this offer because "it would unnecessarily prolong the trial." Petitioners submit that both the Trial Court and the Lower Court in thus limiting the defense violated their privileges under the United States Constitution, Amendment 5, not to "be deprived of life, liberty * * * without due process of law" and under Amendment 6, "to have compulsory process for obtaining witnesses in his favor."

The Lower Court in sustaining the Trial Court's position on this point states that "cases cited by appellants dealing with fraud in which intent is an element, are not pertinent to this point." (Op. 4). The Lower Court apparently overlooked that the evidence adduced by the Government at the trial in support of Count I was for the purpose of proving a conspiracy to violate Section 203 *and to defraud the United States.* Since the trial court never viewed the phrase "to defraud the United States" as surplusage but on the contrary time and time again instructed the jury that Count I included a conspiracy to defraud, petitioners submit that the following cases sustain their position as to the Trial Court's error in thus limiting the defense. In view of the fact that all defendants deny that May was paid anything and two of them testify as to their motive and intent, the offered evidence might have aided the jury in resolving the issue whether the alleged services were performed for compensation or for patriotic purposes. The ruling that intent was immaterial in this case was in conflict with the decisions in:

Haigen v. United States, 172 F. 2nd, 986;

Miller v. United States, (CCA 8) 120 F. 2nd, 968;

C. I. T. Corp v. United States, (CCA 9) 150 F. 2nd, 85.

Petitioner submits that, irrespective whether the offenses charged involved fraud or not, that the proffered corroborative testimony was admissible because

it would have thrown light on the alleged criminal intent of the defendants. The testimony of a large part of the proffered witnesses would have centered around the issue of the alleged criminal intent. But, as a matter of fact, the record shows that no corroboration was permitted.

The Lower Court in holding (Op. 15) that "whether the complaints were or were not well founded in fact was immaterial to that issue" (whether May acted because of the money he received) greatly misapprehended petitioners' argument that they were entitled to buttress and corroborate all statements as to their motives by independent substantive evidence. All the proffered evidence was relative to the issue whether May acted because of the complaints he heard or because of the money he was alleged to have received. This error was made more prejudicial by the Trial Court's charge to the jury that it could believe the defendants' statements as to their motives but was not bound to do so. If the excluded testimony had been admitted, it is possible that, in some respects the jury could have disbelieved the defendants' statements, and in other respects, including motives, could have believed them. In short, the defendants were entitled to have their statements corroborated by the testimony of the proffered witnesses as to the background preceding the alleged services by May. The Lower Court overlooked the record in its opinion (Op. 15) when it stated:

> "But whether May being paid to make the calls was striving to correct an actual impropriety or

was activated by a groundless complaint was wholly immaterial. That is, payment for the services having been received, his subsequent 'motive' to correct an actual impropriety had no bearing on the offense."

The foregoing statement by the Lower Court was not corroborated by the record. Both May and Henry Garsson testified that no money was paid as compensation for alleged services. The Government failed to introduce any witnesses to contradict their statements as to their motives. The Lower Court's decision was in conflict with the decision of the other Courts of Appeals in the Miller, Haigen and CIT Cases. In Miller v. United States, supra, p. 970, 971, Judge Huxman stated:

> "Intent is an essential element of fraud. * * * Whenever the belief of a person or the motive of his act or conduct is material, he may not only directly testify that he had no intent to defraud, *but he may buttress such statement with testimony of relevant circumstances, including conversations had with third persons or statements made by them, tending to support his statement that he had no intent to defraud.* * * * A jury would be more inclined to give weight and consideration to statements and conversations upon which a conclusion was based than to a mere statement by the accused of his conclusion, unsupported by such statements." (Italics ours)

Although the Lower Court stated (Op. 15):

"The issue was whether May acted because of the complaints he had or because of the money he received."

Nevertheless, he excluded testimony to corroborate the petitioners on this very issue. If that was the issue, then under the Sixth Amendment, the accused is given the right "to have compulsory process for obtaining witnesses in his favor." These petitioners have the right to call witnesses in their behalf to support their position on this issue. The Court could only exclude the testimony of the proffered witnesses if it agreed that there was no issue on the subject and that testimony of May as to what he had in mind when he performed the alleged services was accepted as true. However, the Trial Court left this very issue to the jury by charging them they could find the defendants not guilty if they believed May as to his motives, namely that it was his duty to make these calls when his attention had been called to improprieties, incompetence and injustice.

The Trial Court ordered the defense to submit a list of witnesses to be subpoenaed and then did not permit twenty-three (23) of the persons listed to be subpoenaed. The Trial Court's action clearly constituted a violation of the Sixth Amendment. The purpose of introducing this corroborative testimony was to prove that any Congressman in May's position would have had to act in the same way that any reasonable man would have acted and was duty bound to make these calls without compensation, and that his failure to do so would have been neglect or dereliction of duty on his part. The purpose of the proffered witnesses

was to prove the defense in this case—that May had no choice in the matter; that he was duty bound to make these calls; and that the calls were not made for compensation. In fact, the Government did not prove that money had been paid May for compensation for such alleged services. It merely inferred that this was the case by showing that monies passed through his hands. The Lower Court in stating this inference as a fact overlooked that this was merely taking a statement from the context, giving no consideration to the uncontradicted explanation of these defendants that the calls were not made for compensation. The conclusive and undisputed proof was that May did not retain one cent of this money any more than a bank cashier receives money for himself when a depositor gives it to him as a fiscal agent.

The testimony of the proffered witnesses, in short, would have shown that under the facts presented to him, May was obligated to do whatever he did in this case. His testimony would have shown the circumstances which impelled his action in making these calls and performing the so-called services. The proffered testimony would have also shown that despite the calls made by May, nothing was accomplished for the benefit of Erie Basin or Batavia or the other defendants. The natural conclusion from such testimony would be that he had made these calls for patriotic services and not for compensation. It is fantastic to believe that men would make payments to a Congressman, as contended by the Government, over a period of years where they received no benefit. The proffered

testimony went to the heart of the case—whether he made these calls for compensation or in the line of his duty as Chairman of the House Military Affairs Committee.

The evidence of these twenty-three witnesses would have proved that May was motivated by his knowledge that these companies, particularly because of Dr. Garsson's engineering knowledge and ability, had made valuable contributions to the War effort, had saved the Government many millions of pounds of steel, many millions of manhours of labor, and many millions of dollars by the design and introduction of processes which were adopted by the Government and other contractors. Their evidence would have shown that the discrimination was detrimental to and was actually hampering the War effort. Their testimony would have shown the grave injustice that had been done to these defendants in accusing them of wrongful acts; that the so-called "overt acts" were far from being evidence of, or in furtherance of, a conspiracy to defraud the Government, but were in fact the opposite, all acts done for the benefit of the Government. The testimony would have shown that the intent of the defendants was solely to further the War effort, and that their actions were worthy of commendation, rather than condemnation.

The Lower Court stated "that whether the complaints were or were not well founded in fact was immaterial to that issue." It would be more likely for a Congressman to have acted time and time again for

a small manufacturer if he had reason to believe that their complaints relative to discrimination were well founded.

The question herein involved, whether persons accused of conspiracy to defraud the United States and of substantive violation under 18 U.S.C.A., Section 203, should be permitted corroboration of their testimony as to their motives and intent is one of general importance, which has never been decided by this Court. The question involves the application of the Fifth and Sixth Amendments of the United States Constitution which have not, but should be, settled by this Court.

IX.

THAT THE PETITIONERS WERE DEPRIVED OF THE FAIR AND IMPARTIAL TRIAL GUARANTEED TO THEM UNDER THE UNITED STATES CONSTITUTION, AMENDMENTS FIVE AND SIX.

The Court of Appeals in its opinion overruling the petitioners' argument that they had not received a fair and impartial trial (Op. 15-17) overlooked the cumulative effect of all the specific items of misconduct and partiality, including: (a) the prosecuting attorney's misconduct; (b) the Trial Judge's taking over the cross-examination of the defendants; (c) the errors of the Trial Judge in his charge to the jury; (d) the prejudicial remarks of the Trial Judge during the progress of the trial; (e) the Trial Court's unfair comments on the defendants' failure to testify; and (f) the Trial Court's failure to examine jurors as to whether they had read inflammatory and prejudicial articles during the trial. The cumulative effect of all these acts of misconduct, in view of the background of the case, were to deprive the petitioners of a trial by "an impartial jury" in violation of the Sixth Amendment, and also to deprive them of life, liberty and property "without due process of law" in violation of the Fifth Amendment.

This court must take judicial notice of the fact that prior to the Grand Jury investigation of the affairs of Erie Basin and Batavia and of these petitioners that the so-called Mead Committee (the Senate Committee Investigating the National Defense Program) conducted both closed hearings and public hearings relative to said matters. The public hearings lasted approximately a month. The testimony adduced at these public hearings constituted "hot news." Throughout July and August of 1946, the newspapers in this country and particularly in the District of Columbia, were filled with almost verbatim accounts of the hearings. It was impossible for anyone living in the District during those hectic days to have forgotten all the publicity accorded to the so-called "May-Garsson Hearings." With this background in mind, petitioners submit that the cumulative effect of all said errors was to deprive defendants of a fair and impartial trial.

For example, during the trial, in rejecting defendants' Exhibit 302 offered in corroboration of Henry Garsson's testimony relative to the manpower problem, the Trial Court unfairly characterized the witness's testimony as "self-serving". "* * * This is just elaborate detail with some self-serving statements in it." (R. 4083). Later, the Trial Court made the following most damaging prejudicial remark in the presence of the jury:

> "* * * I think you are entitled to do that (to show through General Waitt the nature of the

complaint), *but I don't see the necessity of constant statements by this witness now as to how good he was* * * * but there have been a number of definitely self-serving statements which did register to me, at least, as having had anything to do with the conversations or that he was telling General Waitt that he was good." (Italics ours)

The Trial Court's effort (R. 4420) to apologize for this "definite injudicious statement by the Court" and instructions to the jury to disregard the statement only aggravated the harm done by his explanation of his personal disbelief of the witness's testimony.

The record shows that the Trial Court, almost day after day, through a forty-seven (47) day trial, continued to berate and belittle the defense and the defendant's counsel and to hold up the Government's witnesses as worthy of belief. This attitude did much to prejudice the jury against these petitioners.

Another example of the Trial Court's bias is seen in its granting of Government's request for instruction No. 12 after it first indicated it was going to refuse the same because it was argumentative and only after the defense counsel had finished their arguments to the jury (Point XI B).

The Trial Court's treatment of defendant's Exhibit 295, a letter from General English to the petitioner dated March 27, 1944 commending Erie Basin's excellent production record, is another example of

its belittling of the defense[3]. After having refused to admit the proffered exhibit into evidence on numerous occasions, and after finally admitting it into evidence,

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[3] (Def. Ex. 295)

Army Service Forces, Headquarters,
Seventh Service Command,
Omaha, Nebraska

27 March 1944.

Dr. Henry M. Garsson, Vice President, Erie Basin Metal Products, Inc., Elgin, Illinois.

MY DEAR DOCTOR GARSSON:

I very much regret that pressure of official business here in Omaha makes it impossible for me to attend on Saturday, April 1st, as I know of no company that came under my general surveillance during the time that I was Chief of Industrial Operations for the Chemical Warfare Service, that is more deserving of this recognition.

When I look back on the whole shell program where we passed from a forged shell to a tubing, and in which your company made so many fine contributions to the development thereof, it seems almost a miracle that we really reached quantity production; and I do believe your company made a most singular contribution in every way to the development and mass production of this shell which was proven to be such a great factor in the victorious march of our troops in Tunisia, Sicily, and now in Italy. I congratulate and salute you, the officers of your concern, and all of your employees on a job well done.

Again I express my regrets at not being able to be present on the day you receive the highest award of our Government for excellence in production that you so richly deserve.

Sincerely yours,

(Signed) PAUL X. ENGLISH,
Brigadier General, GSC,
Chief of Staff.

the Trial Court destroyed the entire effect of the Exhibit by expressing surprise at its being in evidence.

Again, the Trial Court showed its prejudice in commenting unfairly upon the failure of defendants to testify. The record shows that on at least four separate occasions the Trial Court commented on defendants' failure to testify. Such comments as:

> "Congressman May, Mr. Henry Garsson, Mr. Murray Garsson and Mr. Freeman may all testify concerning their motives and concerning the background of situation * * * I don't see * * * the competency of the person by any other method except the testimony of any one or all of the gentlemen who are on trial here as to those matters (R. 1569) * * * I certainly think Congressman May has a right to do it (testify) and the Garssons have a right to do it—'this is what the situation was and this is what we did and that is why we did it.'" (R. 1573-1574).

Then later, during the examination of the defendant, Henry Garsson, in rejecting defendant's Exhibit 337, the Trial Court made this statement relative to the position taken by Murray Garsson: " * * * but he is not making it on the witness stand" (R. 4276). In thus emphasizing that only the defendants would be permitted to testify as to their motives, the Court not only commented on the failure of the petitioner, Murray Garsson, to take the stand, but also and more particularly placed the other defendants in a position of being forced to testify in their own defense.

The lower court had decided this question of general importance, which has not been and should be settled by this Court. It is important that defendants be protected during the trial from any unfavorable comment in *advance* as to their failure to take the stand and also at all stages of the trial from their failure to so testify. Further, the lower court's decision of this point involves a construction of the Act of May 16, 1878 (28 U.S.C.A., Section 632) which restrains the Court from commenting on the failure of an accused to testify, which has not been but should be settled by this Court. The Trial Court's comments were not rendered harmless by the fact that two of the defendants did afterwards testify, since such comments virtually compelled them to do so in order to avoid unfavorable inference by the jury. See *McKnight v. United States*, 115 F. 972; *Linden v. United States* (C CA 3) 296 F. 904. In the Linden case, the Court in instructions commented on the fact that certain witnesses were not contradicted. Since this contradiction could only come from the defendants themselves the Circuit Court therein held that the Trial Court's instructions constituted reversible error under 28 U.S.C.A., Section 632.

From the start of the trial, this case was a series of unfair violations of the petitioners' civil rights. Henry Garsson's private papers were seized from the custody of the warehouseman without a search warrant and by subterfuge (Argument Point III). The newspapers and radios headlined the case for months. A short time before the trial, petitioner, Henry Garsson, was indicted for perjury for statements alleged to have

been made before the Grand Jury (this matter was subsequently dropped by the Government). During the trial, when the newspapers learned that the petitioner, Henry Garsson, was to take the stand in his own defense the following day they headlined the fact that the witness about to testify had been indicted for perjury before the Grand Jury on the same matter. The jury was not locked up during the trial and had access to newspapers and radios despite the Trial Court's cautionary instruction to them. The petitioner's Motion for Dismissal made on this ground was denied.

Again during the trial on the cross-examination of character witnesses for petitioner, Henry Garsson, the Government attorney brought out that Henry Garsson had been previously indicted in 1926, twenty years before the trial in this case. Even though it was shown that Henry Garsson had been acquitted of the charges made against him, nevertheless the atmosphere created by this cross-examination had a most prejudicial effect on the jury. The charge was so remotely connected that the only purpose of the Government attorney in bringing this out was to prejudice the minds of the jury against these petitioners and particularly against Henry Garsson.

Petitioners submit that the cumulative effect of all these acts of misconduct deprived them of their Constitutional rights to a fair trial as guaranteed to them by the Fifth and Sixth Amendments to the United States Constitution.

X.

ERRORS IN TRIAL COURT'S REFUSAL OF PETITIONERS' REQUESTS FOR INSTRUCTIONS

A. Trial Court's Refusal to Exclude Lawful Overt Acts As Proof of Conspiracy and of Substantive Offenses.

The petitioners join in and incorporate by reference thereto the argument in the brief of Petitioner May on the points relative to the errors of the Trial Court in refusing their requests for instruction.

Without limiting the argument of this point, petitioners submit that the Court Below erred in sustaining the Trial Court's refusal to charge as stated in defendants' points for charge Nos. 26, 27 and 28. These requested instructions pertained to the jury's being permitted to consider the 35 alleged overt acts mentioned in the indictment, as well as the other alleged overt acts brought out during the trial, in determining whether the conspiracies charged in Count I, or the illegal agreements charged in Counts III and IV existed. The Court charged the jury (R. 6975) that it might take into account the "various alleged overt acts", in determining whether those very acts indicate the pre-existing agreement. Then later (R. 6978-6979), the Court stated:

> "* * * I do not think, at the moment, of any single overt act alleged or proved which, in itself,

was a thing that either by law or otherwise, he did not have a right to do; for instance, specifically telephoning Secretary Patterson, General Campbell. There is nothing illegal about that, in itself. What is illegal about it, if anything, is whether he did it for compensation. * * * He had a right to be in business. He had a right to be in Cumberland Lumber Company. He had a right to do all these things. In and of themselves there is nothing wrong with them, but they are all wrong if he did it for compensation and the government would only have to satisfy you that he did one of those things if you believe there was this illegal agreement. It isn't necessary to prove them all."

In short, the Court instructed the jury that there was nothing in the overt acts mentioned in the indictment or otherwise testified to which were of a character that are usually, if not necessarily, done pursuant to a previous scheme and plan. Therefore, petitioners submit that the Trial Court committed fundamental and reversible error in refusing said points for charge, and later in charging the jury that it could consider such overt acts as evidence of the conspiracy and illegal agreements charged.

The Court of Appeals' Opinion on this question clearly does not give effect to the applicable decision of the Court of Appeals in *United States v. Glasser*, 116 Fed. 2d, 690, where it was held that overt acts when proven may be considered as evidence of the conspiracy charged only where the overt acts are of a character that are usually if not necessarily, done pursuant to a

previous scheme and plan. Since the Trial Court instructed the jury that none of the overt acts was illegal or improper, then under the decision in the Glasser case, it necessarily follows that such overt acts could not be used in determining the existence of the alleged conspiracy or substantive offenses.

This point presents a question of general importance relative to the sufficiency of lawful acts to prove a conspiracy and substantive offenses, especially where there is no independent proof thereof, which has not been, but should be decided by this Court.

B. Trial Court's Error in Refusing to Instruct Jury as to Petitioners' Theory of Defense.

Petitioners further submit that the Court Below erred in sustaining the Trial Court's refusal of defendants' point for charge No. 55 to the effect that the jury must not find that May owned the Cumberland Lumber Company from letters written by him, his utterances and his activities, if they believe that such letters, utterances and activities were induced by his desire to promote the successful production of lumber for the war effort in his own district, and that the same were caused by the labor situation in his district and the feeling against foreign corporations. Petitioners submit that they were entitled to have their theory of the case presented to the jury, especially in view of the Court's granting of Government's request for instruction No. 12.

The Trial Court's refusal of this request excluded and ignored the entire defense in this case. It resulted in a one-sided charge to the jury and presented only the Government's case. It ignored all the evidence adduced by the defendants as to their good faith during the period covered by the indictment. In short, it excluded from the consideration of the jury the *good faith* of Congressman May, as outlined in the defense.

The main medium through which the Government contended that May received compensation for alleged services was through the organization and management of the Cumberland Lumber Company. If his handling of the affairs of this corporation were performed for purely patriotic reasons, then that factor should be presented to the jury, otherwise the jury was left with the inference that whatever moneys of Cumberland passed through his hands and were disbursed for corporate purposes, were given to him as compensation.

The Court of Appeals in sustaining the Trial Court's refusal of point for charge No. 55, overlooked the following applicable decisions of other Courts of Appeal relative to the effect that the refusal of instructions excluded or ignored essential issues or defenses constitutes reversible error:

United States v. International Fur Workers Union, 100 Fed. (2d) 541 (C. C. A., N. Y.);

Moran v. United States, 264 Fed. 768 (C. C. A., Tenn.);

Hyde v. United States, 15 Fed. (2d) 816 (C. C. A., S. C.).

XI.

ERRORS IN TRIAL COURT'S CHARGE TO JURY

A. Error in Charging Jury That May Would Be Guilty of Violating 18 U.S.C.A. Sec. 203 if He Received Compensation for Work Done for Cumberland Lumber Company.

The Trial Court's charge to the jury presents a question of construction of 18 U.S.C.A., Sec. 203, which has not, but should be decided by this Court. The Trial Court in charging on the right of Congressman May to act for the Cumberland Lumber Company, stated (R. 6978-6981):

> "* * * He (May) had a right to be in business. He had a right to be in the Cumberland Lumber Company. He had a right to do all these things. In and of themselves there is nothing wrong with them, but they are all wrong if he did it for compensation. * * *"

> "* * * The same is true with respect to the fact that Congressman May acted as process agent. * * * There is nothing illegal or unlawful about that in and of itself. It is one of those things you take into consideration with all the other evidence in determining whether it was done for compensation or whether it indicated he was the real owner of the Cumberland Lumber Company. * * *"

The inference from these remarks is that if May got paid for work he did for the Cumberland Lumber Company he violated the provision of 18 U.S.C.A., Sec. 203. This Section merely makes it illegal for a Congressman to perform services for compensation for third parties before Governmental departments. Cumberland had no matter of any kind pending before any Governmental Department, and had no contracts with the Government. Therefore, only assuming that May received compensation for work done for Cumberland, such receipt could not, by any stretch of the imagination, be classified as a violation of Section 203. This instruction amounted to a direction to the jury to convict the defendants if May merely received compensation for work done for Cumberland. Such instructions constituted reversible error.

B. Trial Court's Granting of Government's Request for Instruction No. 12 is in Conflict with F. R. C. P. 30.

Petitioners submit that they were substantially prejudiced by the Trial Court's error in giving almost verbatim of Government's request for instructions No. 12 (R. 6981-6983). The Court of Appeals overlooked the provisions of Rule 30 of the Federal Rules of Criminal Procedure which govern the question of requests for instructions:

"Rule 30 Instructions: At the close of the evidence or at such earlier time during the trial as

> the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. * * * The court shall inform counsel of its proposed action upon the request prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. * * *"

Nothing is so indicative of the Trial Court's bias in this case than its action in entertaining and affirming Government's request for instruction No. 12 after the arguments in the case had started and after the defense had completed its arguments before the jury—all this in violation of F. R. C. P. 30. The Court Below overlooked petitioner's argument that the transcript of the record showed that the Government did not submit to the Trial Court written requests for instructions *at the close of the evidence,* but only did so after two of the Special Assistant Attorneys General, Arenson and Vincent, had presented their closing arguments to the jury on Friday, June 27, 1947. Defendants' requests for instructions had been presented and disposed of prior to the Government's arguments on the preceding Thursday. Even after the Government had submitted its request, the Trial Court indicated to all parties present that it was going to refuse them (R. 6484).

The Court of Appeals overlooked the fact that defense counsel had every reason to assume that the Trial Court would refuse Government's instruction No. 12. Thereafter, defense counsel made their closing arguments on the assumption that the Trial Court had re-

fused this point for charge. In ruling on this point, the Court of Appeals overlooked the applicable decision in *Linn v. United States,* 251 Fed. 476, 482, which held:

> "* * * Requests which are presented after the charge has been given, and even after the arguments have been concluded, are usually designed to lead a judge into error and the practice of entertaining requests so presented is not deserving of encouragement."

The petitioners were prejudiced not only by the Trial Court's disregard of R. F. C. P. Rule 30, in the manner in which it considered the Government's request after the arguments had started and in the manner in which it first indicated that it was going to refuse the request, and then later give it almost verbatim, but they were also prejudiced by the erroneous instruction therein embodied. The fundamental error in the Trial Court's affirmance of this point for charge is argued more fully in the next sub-heading.

C. The Trial Court's Charge Was Confusing and in Conflict With the Applicable Decision of This Court in Keegan v. United States.

That the decision of the Court of Appeals in holding that the Trial Court's charge was not generally confusing, contradictory, misleading and biased was in

conflict with the applicable decisions of this Court and other Courts of Appeal:

Keegan v. United States, 325 U. S. 478, 65 S. Court, 1203;

Bollenbach v. United States, 326 U. S. 607, 66 S. Court 402;

Miller v. United States, 120 Fed. 2d 962;

Sunderland v. United States, 19 Fed. 2d. 202, 216.

The Lower Court overlooked that portion of the Trial Court's charge (R. 6981-6989), in which it first stated that the Jury should convict the defendants if it believed they conspired to defraud the United States *or* to violate 18 U. S. C. A. Sec. 203 and committed one or more of the overt acts to effect the object of the conspiracy, and if the jury further believed that defendants violated Section 203 as alleged in Counts III and IV of the indictment—"irrespective of what your conclusion may be as to the merits of the matters and things concerning which Mr. May contacted the War Department, and irrespective of what you believe as to the contributions, if any, of the defendants, Henry Garsson and Murray Garsson, to the war effort." (R. 6981).

Thereafter, the Trial Court wiped out the theory of the defense by giving verbatim the Government's request for instruction (R. 6981-6983), and charging the jury that it was *immaterial* "whether the matter pending before the Department should or should not be decided favorable to the person in whose interest the Congressman rendered or attempted to render services",

and then characterizing, item by item, practically all the testimony adduced by the defendants as immaterial. Then later (R. 6984), the Court stated that the foregoing items of testimony were competent "only in order for you to determine whether you believe they are true at all." Thereafter, the Court practically repeated the Government's request for instruction No. 12, overemphasizing the Government's position (R. 6984-6989).

The Trial Court's charge to the jury on this point was most confusing and misleading. In one breath it admitted that the aforementioned items of testimony were material and then later in the charge instructed the jury that these items were immaterial if the jury found the defendants guilty of Counts I, II and IV. Evidence is either material or immaterial. It should not be left to the province of the jury to distinguish the materiality of such testimony for the purposes mentioned by the Trial Court.

The Court of Appeals particularly failed to give proper effect to the applicable decision of this Court in *Keegan v. United States,* 325 U. S. 478, 65 S. Court 1209, 1210, where Mr. Justice Roberts stated:

> "Here the honesty and the bona fides of the defendants is said to be immaterial; the fact that they desired to test the constitutionality of the law is said to be immaterial. Nowhere is it stated that Bund Command No. 37, without more, does not amount to counselling to evade military service. Mingled with instructions that innocent motives were no excuse, and the intention to test the constitutionality of the law was no excuse, are state-

ments that these are not excuses where there is a conspiracy knowingly to counsel evasion of military service. The statements are mutually contradictory. One with innocent motives, who honestly believes a law is unconstitutional and, therefore, not obligatory, may well counsel that the law shall not be obeyed; that its command shall be resisted until a court shall have held it valid, but this is not knowingly counselling, stealthily and by guilt, to evade its command. Thus having charged that innocent motives and a desire to test the validity of the law were not a defense, the court added:

'In regard to the matter of a test case, I call your attention to the fact that no test case was ever made, nor is there any evidence that any legal action was ever prepared, and the further fact that Bund Order No. 37, by its very language, opposes military service until this and all other laws, State and National, which the Bund considered discriminatory, were repealed.'

'Of course, if you believe beyond a reasonable doubt, that the defendants, or any of them, knowingly and unlawfully conspired to counsel evasion of the Selective Service Law, and the matter of a test case was merely a subterfuge to divert attention from their real purpose, you should find such defendants guilty as charged.'

This final statement seems to mean nothing short of this, when taken in connection with what just preceded it: If defendants had innocent motives they are nonetheless guilty; if they had guilty

motives, they, of course, are guilty. It is somewhat difficult to see how the jury could reach any other than a verdict of guilty."

Petitioners submit that the Trial Court's emphatic statements that the war production of the firms, the merits of their complaints, racial prejudice and the discrimination against these firms and their representatives and the other evidence adduced by the petitioners as to their good faith were all immaterial, means nothing short of this when taken in connection with the portion of the charge immediately preceding it: "If defendants had innocent motives they are none the less guilty; if they had guilty motives they, of course, are guilty." In view of the entire charge, it is difficult to see how the jury could reach any other verdict than a verdict of guilty in this case. The charge amounted to an instruction to the jury to convict and constituted prejudicial, substantial and reversible error.

Petitioners respectfully submit that for the reasons hereinbefore set forth the Petition for Writs of Certiorari should be granted.

Respectfully submitted,
CHARLES J. MARGIOTTI,
Attorney for Petitioners.

Of Counsel:
ALLEN J. KROUSE,
SAMUEL GOLDSTEIN.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1949

No. .....

Henry M. Garsson, Petitioner

vs.

United States of America

MOTION TO DISPENSE WITH PRINTING OF RECORD ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

Comes now Petitioner, Henry M. Garsson, by his attorneys, and respectfully moves this Honorable Court to permit Petitioner to proceed with his Petition for Writ of Certiorari seeking review of the decision and judgment of the court below without being required to print the record in said cause.

In support of said Motion, your petitioner avers:

1. Judgment was entered on January 24, 1949 in the United States Court of Appeals for the District of Columbia Circuit. A Petition for Rehearing was timely filed, considered and denied. This Court has extended the time of the filing of this Petition for Writ of Certiorari to June 4, 1949.

2. The record was not printed in the court below for the reason that that court permitted the Petitioner to proceed on the typewritten transcript and original exhibits.

3. That the testimony in this case amounted to more than 8,000 pages. In addition there were approximately 500 exhibits in the case.

4. Counsel for Petitioner have had printed all those portions of the Record and the instructions of the court which were felt germane to the consideration of the questions to be passed on Certiorari with the exception of those questions which pertain to the sufficiency of the evidence and its admissibility. One complete copy of the printed transcript has been duly certified to by the clerk of the court below and has been filed with this Court for reference.

5. Accordingly, in order that consideration of the Petition for Writ of Certiorari may be had during the present term of this Honorable Court, the Petitioner files this Motion asking leave to proceed on the typewritten transcript and original exhibits and the printed portions of the Record filed with this Court. Petitioner feels that the interest of justice requires a review of the

voluminous Record here involved, that this Motion should be granted and he should be permitted to file his Petition for Writ of Certiorari without being required to print the voluminous Record involved in this case.

Wherefore, the premises having been duly considered, it is respectfully prayed that leave be granted for Petitioner to file a Petition for Writ of Certiorari on the typewritten transcript and original exhibits as embodied in the original Record certified to this Honorable Court by the Clerk of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,
CHARLES J. MARGIOTTI,
Attorney for Petitioner.

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JUN 4 1949
CHARLES ELMORE CROPLEY
CLERK

APPENDIX TO PETITIONS FOR WRITS OF CERTIORARI

SUPREME COURT OF THE UNITED STATES

No. ~~840~~ 100

ANDREW J. MAY, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent*

No. ~~841~~ 101

MURRAY GARSSON, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent*

No. ~~842~~ 102

HENRY M. GARSSON, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent*

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPREME COURT OF THE UNITED STATES

No. —

ANDREW J. MAY, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent*

No. —

MURRAY GARSSON, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent*

No. —

HENRY M. GARSSON, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent*

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPENDIX TO PETITIONS FOR WRITS OF CERTIORARI

Instructions of the United States District Court for the District of Columbia to the Jury.

July 2, 1947

Charge to the Jury

"The Court:

The Court: (Schweinhaut, J.) Now, ladies and gentlemen: I am going to try to discuss the law of this case with you briefly.

I don't intend to comment upon the evidence except only as it may be necessary to make clear some principle of law concerning which I will have to instruct you.

To comment upon the evidence otherwise would cause me to do almost as comprehensive a job, in order to do it fairly and objectively and thoroughly, as counsel have, and I think you have heard enough argument in the case.

Moreover, the case has been very well tried. It has been very well argued by the lawyers on both sides. And you have listened, as both counsel have told you, with unusual attention, for which the Court also is grateful.

I have had occasion to comment in that regard to you before, and I want you to continue your patience until the matter is finally decided by you.

You have been told that it is an important case. Of course it is an important case, but all the cases in the courts are important. The cases you have already tried in this court are important—were important—and I don't want you to lose your objectivity, which it is necessary that you maintain, by getting your mind off on the avenue of thought as to how important the case is.

This case does call for a high degree of objectivity and a thoughtful application of commonsense, but I have no fear whatever that you will give it that.

It has been a long case and counsel on neither side are to blame for that, in my opinion.

I think the evidence that this Court admitted was all entirely competent, and that the nature of it was such as to make it a longer trial than any of the lawyers or I thought at the outset it would be.

Actually, however, the issues are quite simple,—really as simple as any case you have tried in this court room, when you come down to the fact of the matter—and I want to talk with you about them in simple language.

I have not prepared a written charge because I would rather talk to you than to read to you, except in some instances I will have to do that, and I want to talk with you in simple language.

This is not a charge drawn for lawyers or law books, but for you who are the triers of the facts in the case.

First I want to remind you of some general principles as to which I have had occasion in the past to instruct you.

First, you are instructed that it is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to your individual judgment. To each of you I would say that you must decide the case for yourself but you should do so only after discussing it with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is unreasonable or erroneous.

You should not be influenced though in any way on any question submitted to you by the single fact that a majority of the jurors, or any of them, favor a particular decision or hold an opinion at variance with your own. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of the other jurors, but you must listen to your fellow jurors calmly and sympathetically and with understanding and with a willingness to appreciate the view that your fellows express so that you won't be just stubborn and resist reasonable persuasion and reasonable argument as to what the facts are in the case, all to the end that your judgment will be an independent but collective, unanimous judgment.

You are further instructed that the attitude and conduct of jurors at the outset of their deliberations are matters of considerable importance. It is unbecoming for a juror upon entering the jury room to voice an emphatic expression of his opinion on the case or to announce his determination to stand for a certain verdict. When one does that at the outset, his sense of pride may cause him to hesitate to recede from an announced position even though it may be shown that it is fallacious.

Remember that you are not partisans or advocates in this matter, but you are judges. The final test of the quality of your service will lie in the verdict which you return to this courtroom, not in the opinions any of you may hold as you retire.

Bear in mind that you will make a definite contribution to efficient judicial administration if you arrive at a just and proper verdict in this case.

To that end, the Court reminds you that in your deliberations in the jury room there can be no triumph other than the ascertainment and declaration of the truth.

Now, also I want to remind you, as I have before, that the indictment is not evidence in the case, nor is the fact that a Grand Jury found an indictment to be considered by you as evidence. It is merely the formal accusation of crime. It is merely the medium or vehicle by which the matter is brought for the first time before jurors, such as you, for final determination as to the truth or as to the validity or invalidity of the accusation, the innocence or guilt, as the case may be, of the defendants.

On the contrary, defendants in a criminal case are presumed to be innocent of the crime charged against them, and that presumption remains with them throughout the trial, and it prevails until and unless in your final deliberations you should become convinced of their guilt beyond a reasonable doubt. Hence, the burden rests upon the Government to establish guilt—not upon the defendants to establish innocence.

Now, a reasonable doubt is what the term implies. It is a doubt based upon reason, arising out of the evidence or lack of evidence in the case.

It is such a doubt as after a full and fair consideration of all the evidence will leave a juror's mind so undecided that he does not have an abiding conviction of the defendant's guilt, that is, a settled conviction of guilt, which he believes will remain unshaken by future thought and reflection.

It is such a doubt as would cause a reasonably thoughtful and prudent person to hesitate to act if confronted with a question of importance concerning his own affairs.

Such a doubt does not arise from mere conjecture, speculation, whim, or caprice, nor from reluctance to convict through feelings of sympathy or mercy. It is a conscientious belief arising only after calm, dispassionate and impartial consideration of all the evidence that there is a reason to doubt the defendant's guilt.

And, of course, it does not imply proof beyond all doubt. Happenings between human beings cannot usually be proven to an absolute certainty. Hence the law does not require it.

It does, however, require as a fair shield of protection that one shall suffer the loss of his good name, of his liberty or his life, as the case may be, until his guilt has been established beyond a reasonable doubt, as I have defined it.

If upon the whole evidence, again not upon speculation or guess or suspicion, but from the evidence in the case there are two equally balanced hypotheses, inconsistent one with the other, a hypothesis consistent with guilt on the one hand, and a hypothesis consistent with innocence on the other, you must take the one most favorable to the defendants.

That means, of course, not just that there are two theories in the case, the one offered through the evidence on the part of the Government and the other—inconsistent with that—offered on the part of the defendants. They must be equally consistent in your mind, after having exercised your reasoning powers and after having given thought in weighing and evaluating the testimony. If you find then that these inconsistent theories are in balance, you must acquit.

In judging of the evidence you must evaluate the testimony of individual witnesses. Only thus can you determine the truth, and it is the truth you seek.

Bring to that task your knowledge of human nature; your commonsense; your ability to judge of men; their sources of knowledge; their intelligence; their motives; their intentions, all as you may discern the real character behind the spoken words and measure their weight of truth and accuracy.

You may, of course, in considering the testimony of individual witnesses, take into account their manner and demeanor and conduct on the witness stand.

Now, interest in those things involved within the controversy or its results; friendship or animosity towards persons concerned therein, and many other human factors, may or may not affect the desire and capacity of a witness to tell the truth.

Give to the testimony of each witness that weight and that weight only that you believe it is entitled to when viewed in the light of these considerations and in the light of all the other evidence in the case.

Now, in weighing the testimony, in judging of the plausibility or implausibility of the story that the witnesses have told, you are instructed that if in your opinion any witness has testified falsely concerning a matter as to which he could not reasonably be mistaken, you may disregard and reject all or any part of the testimony of such witness.

You are instructed that the fact that the defendant, Murray Garsson, has not testified in his own behalf should not be considered or construed in any way against him, and you are not at liberty to indulge in any presumption or inference because he has not testified in his own behalf. He has a right to testify, or not, as he pleases.

The defendants, May and Henry Garsson, have introduced evidence on their behalf to the effect that their reputation for honesty and integrity is good. You are instructed in this respect that as a matter of law the circumstances of a case may be such in your minds that evidence of good character may alone create a reasonable doubt although without it the other evidence would be convincing. That evidence is to be considered and weighed with all the other evidence in the case, and you may consider, if you find that it is so when you have evaluated the evidence, that it alone may create a reasonable doubt, and that is for you to determine.

Now, in that connection, I have granted defendants' request for instruction, which reads as follows, and I will read it as they submitted it to me:

Certain character witnesses have said that they had heard that Henry M. Garsson, one of the defendants, was indicted, tried and acquitted, of an alleged violation in a District Court in New York; and in connection therewith and prior thereto, was dismissed from the Revenue Department, and that Henry M. Garsson was later denied admission by the New York State Bar Committee, but that this did not affect their opinion of the reputation of the said defendant. This evidence of the prior and of refusal of admission to the Bar must not be considered by you as substantive evidence or as affecting Henry M. Garsson's credibility as a witness. It was only offered for the purpose of affecting the credibility and or knowledge of the

character witness himself and cannot be used in any way as evidence against the defendant, Henry M. Garsson.

You will be given the indictment to take with you, and you will notice that in it there are four counts. The counts, as I am sure you have already been told in the past, by me, means charges. Each count is a separate charge.

One of them, as you have been told, Count 2, is out of the case, so don't take the time to read it even. Count 2 and Count 3 charge precisely the same offense; except for technical reasons they were couched in somewhat different language, and the Government has elected to submit the third count to you rather than the second.

I shall address myself first to the third and fourth counts of the indictment, and then come back to Count One, solely for the reason that I have a little bit more to say about Count One than I have about the other two.

Count 3 and Count 4, as well, charge violations of a Federal law, which I will read to you and tell you what the Government charges with respect to it.

That law, so far as applicable here, reads as follows:

> "Whoever, being elected or appointed a Member of Congress, shall, after his election or appointment and either before or after he has qualified, and during his continuance in office, shall directly or indirectly, receive, or agree to receive, any compensation whatever for any services rendered or to be rendered to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation or arrest, or other matter or thing in which the United States is a party or directly or indirectly interested, before any department, court-martial, bureau, officer, or any civil, military, or national commission whatever, shall be punished."

That is the language of the statute which the indictment charges was violated specifically, in Counts three and four.

Those two counts, each of them charge in substance that Congressman May, being a Congressman at the time, did receive compensation for services rendered or to be ren-

dered to the defendants, Henry M. Garsson and Murray W. Garsson; and it also names Joseph F. Freeman, who, as you know, is no longer in the case.

That is the offense which this statute announces.

They also charged in each of those counts that the defendants, Henry Garsson and Murray Garsson, while themselves incapable since they were not members of Congress and didn't receive compensation, but that they nevertheless are guilty with Congressman May, as principals, because by giving him the alleged compensation they thereby aided and abetted him in the alleged violation of this Section 203, Title 18, of the Code, which I have just read to you.

In that respect another section of the Criminal Code provides that whoever aids, abets, counsels, commands, induces or procures the commission of an offense defined in any law of the United States, is a principal. That is just as much so as in this case the Congressman himself, if he were guilty.

So that they charge in the third and fourth counts a joint offense by these three remaining defendants.

You could not find that either Henry Garsson or Murray Garsson were guilty unless you also found that Congressman May is guilty. That is so as to each of those two counts. That is so, as a matter of fact while I think of it, of all three counts in the case. I forgot to tell you that when I came back to number one.

Mr. May, if he is guilty at all, is in each one of these three counts, and you couldn't find under either one of these three counts either or both of the other defendants guilty and Congressman May not guilty. You could not do that.

You could find that Congressman May and either one or both of the other two defendants were guilty. You could find one of them not guilty and the other guilty, but in no case could you acquit the defendant May and convict either or both of the other defendants.

I granted defendants' request for instruction concerning Count 3 in the indictment, which I have somewhat changed, and I will also read that to you:

Count 3 of the indictment charges the receipt of a check of the sum of $5000 by the defendants, Henry M. Garsson

and Murray W. Garsson, and Erie Basin Metal Products, Inc., to Andrew J. May.

In this connection, in order to establish the offense charged in Count 3 of the indictment, you must find beyond a reasonable doubt from the evidence that payment was made directly or indirectly by check of the Erie Basin Metal Products, Inc., of the value of $5,000, by the defendants, Henry M. Garsson and Murray W. Garsson to Andrew J. May in return for the rendition of services by Mr. May. The evidence of the Government must conform to this allegation.

If you find from the evidence with respect to Count 3 that the Government has failed to prove the payment in the sum of $5,000 to the defendant May for compensation, or that the evidence on this aspect of the case is evenly balanced, as I told you a bit ago, or that the evidence on this aspect of the case does not convince you beyond a reasonable doubt of the evidence of such a payment, then you must return a verdict of "not guilty" as to all the defendants on the third count.

With respect to the fourth count I granted the defense request for instruction, which I will read also:

Count 4 of the indictment charges the agreement to receive, directly or indirectly, by Andrew J. May, from Henry M. Garsson, Murray Garsson, Erie Basin Metal Products, Inc., and Batavia Metal Products, Inc., compensation for services rendered and to be rendered by Andrew J. May to Henry M. Garsson, Murray W. Garsson and the corporations, in the sum of $15,477.60 from Batavia Metal Products, Inc., and the sum of $38,156.47 from Erie Basin Metal Products, Inc.

In this connection, in order to establish the offense charged in Count 4 of the indictment, you must find beyond a reasonable doubt from the evidence that there was in existence an agreement to receive, directly or indirectly, the sum of $15,477.60 from Batavia Metal Products, Inc., and the sum of $38,156.47 from Erie Basin Metal Products, Inc., by Andrew J. May in return for the rendition of services by Andrew J. May to Henry M. Garsson, Murray W. Garsson, Erie Basin Metal Products, Inc., and Batavia Metal Products, Inc.

The evidence of the Government must conform to this allegation. If you find from the evidence that the Government has failed to prove the agreement to receive, directly or indirectly, the aforementioned sums by Congressman May for the rendition of his services as aforesaid, or that the evidence on this aspect of the case is evenly balanced, or that the evidence on this aspect of the case does not convince you beyond a reasonable doubt of the existence of such an agreement, then you must return a verdict of "not guilty" as to all of the defendants on that count.

There is one modification of that instruction that I will make, and that is that it is not necessary to prove those two amounts down to the exact penny. The proof must be substantially near those two named amounts. It doesn't have to be established by the Government to the exact penny.

I think that, for the moment, is sufficient with respect to those counts.

The first count of this indictment charges a conspiracy by these three defendants, and also by Joseph Freeman, to do two things: To violate a law, to commit an offense against the United States and to defraud the United States. The statute under which that count is laid is a simple one and I will read that to you:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished."

You will note that the elements of this crime of conspiracy are three:

(1) A conspiracy by two or more persons.

(2) The purpose of the conspiracy must be to commit an offense against the United States or to defraud the United States in any manner or for any purpose.

(3) Some act must be committed by one or more of the people charged to effect, that is, to bring about, the object of that unlawful agreement.

I will discuss those three elements.

First, as to the meaning of conspiracy. It implies, of course, an agreement of two or more people in the meeting of their minds in a common purpose to accomplish or carry out some act. In this sense a conspiracy may be either entirely lawful or it may be unlawful. But an unlawful conspiracy, which is what is charged by the first count of the indictment, means an agreement of two or more persons to do something that is in itself unlawful, or to do some act which may be lawful but to do it by means which are unlawful, or for a purpose which is unlawful.

And what the Government by this indictment charges in the first count is that these defendants agreed with each other that Congressman May would receive compensation for services rendered and to be rendered by him on behalf of these individuals and the Erie Basin Metal Products Company and the Batavia Metal Products Company. That is the gist of the charge in that first count.

With respect to the second element: The conspiracy must have for its purpose, the agreement must have, the unlawful agreement must have the purpose either to commit an offense against the United States or to defraud the United States.

The word "offense" against the United States as here used has been legally held to mean to violate some criminal statute of the United States.

As applied to this case it is the contention of the Government that the criminal statute, which it was the object of the alleged conspiracy to violate, was this Section 203 of Title 18 which I read to you a few moments ago, which makes it an offense for a Congressman to receive compensation in respect of a matter concerning which the Government is interested.

The Government also contends that the conspiracy in this case was to defraud the United States, as prohibited by the conspiracy statute which I read to you.

You will note the language of that statute forbids an illegal agreement to defraud the United States in any manner or for any purpose. It has been legally decided by the Courts that this phrase "defraud the United States in any manner or for any purpose" is not limited merely to con-

spiracies to deprive the United States of money or property or other things of pecuniary value.

It also comprehends the right of the Government not to be defrauded of the unbiased, independent, faithful, loyal services of its employees, including Congressmen.

And so the allegation, and it is spelled out in the indictment at lengths to which it is unnecessary for me to go, is in that regard that these defendants, including Mr. May, got together and agreed to defraud the Government of his independent, honest, unbiased, unprejudiced, faithful, loyal services as a Congressman.

I should say this with respect to both phases of the statute which has to do with a conspiracy and agreement to commit an offense, the alleged agreement to defraud the United States:

I don't mean to say that it is necessary for the Government to establish that the defendants got together and said, "Let's violate, let's agree together to violate Section 203 of Title 18 of the United States Code."

Or, that they got together and said, "Let's agree to defraud the United States out of your faithful, independent, loyal," and so forth "services."

If they agreed to give him money as compensation, and if he agreed, if it was even implicit in it, if he intended and they knew it and he knew it, if he intended by virtue of that compensation to perform services such as have been alleged and I have described in the indictment, that constitutes the kind of an agreement that the law has in mind and makes illegal.

The third necessary element of the crime charged against these defendants is that the alleged agreement is not deemed to have been completed unless and until one of the parties, one or more of the parties, to the agreement shall do an act to effect and carry out the object of the agreement.

You cannot commit the attempt to commit a particular crime unless you do some act to carry out the intent which has been formed specifically.

That is true here. The Congress has not made it a Federal offense to sit down and agree to violate the law or to defraud the United States alone. The offense is complete only when one or more of the parties in agreement do something to

try to bring it about. And those acts are known as and they are described among others in the indictment as overt acts. There are some thirty or more, I think, set out in the indictment as being so-called overt acts which were designed to bring about this agreement.

The act which is done does not have to accomplish the final and ultimate result desired, nor does it have to be itself an unlawful thing, but it has to be something done physically and outwardly to tend to put into effect or to definitely manifest what was the purpose of the alleged agreement.

The word "overt" in this sense has the sense of an open act, and the indictment specifies a number of them. It means some physical action done for the purpose of carrying out or effecting the object of the conspiracy.

I think I have said this to you: It is not necessary to the offense that those acts or any one of them shall themselves be unlawful. It is sufficient, even if entirely lawful, provided it is done to effect the object of the agreement. Nor is it necessary in this case for the Government to prove all of the separate overt acts which they have set out in the indictment; it is sufficient if the Government proves any one of them.

Now, I point out again that it is not necessary to the establishment of the charge of the unlawful conspiracy and agreement that the object of the conspiracy should in fact be actually accomplished. The essence of the crime of conspiracy is the unlawful agreement to accomplish an unlawful act and the charge is not that the unlawful act was in fact accomplished. It is the agreement, that is, the meeting of the minds, of two or more persons, to accomplish the purpose, followed by some act for the purpose of accomplishing it, although the purpose is not accomplished, that constitutes the crime.

Now, you may, in considering whether there was an illegal agreement, take into account, and give such weight to them as you think they are entitled, the various alleged overt acts, if you believe any of them were done at all, in determining whether those very acts indicate the pre-existing agreement.

If you find the conspiracy as alleged and also find that these defendants were parties to it, then it is the law that the acts and declarations of any one of them in carrying out

the illicit agreement are admissible against and binding upon the others. But of course acts and statements of parties whom you may find were parties to the agreement are in no way binding upon other people whom you do not find were members of the conspiracy.

It is, therefore, necessary and important for you to carefully consider the whole testimony in the case with respect to each of the defendants on trial separately to determine whether he was a member, a party to this alleged illegal agreement and, therefore, whether any acts or statements of the others are binding upon each, each has the right to be tried as if he alone were on trial.

Now, I want to say a word about circumstantial evidence. There is quite a bit of testimony in this case that may be regarded as circumstantial, as distinguished from direct evidence. Direct evidence is where a witness says: I saw this, that or the other thing, and I know it personally; I was there or I heard it.

Circumstantial evidence is where you undertake to prove a fact as a deduction or inference from some other fact. There is a great deal of conflict, and always has been, as to the relative value of direct and circumstantial evidence. So far as the law is concerned, you can prove a case either by direct or circumstantial evidence.

Circumstantial evidence is that character of evidence which tends to prove a disputed fact by proof of other facts which has a legitimate tendency to lead the mind to a conclusion that a fact exists which is sought to be established. This is legal evidence and a jury must act upon it as if it were direct when it is satisfied beyond a reasonable doubt but to the extent that the government's proof in the case is circumstantial, those circumstances relied upon must be consistent with the guilt alone and not the balanced hypothesis of either guilt or innocence as I have told you.

There are a number of other requests that the defendants have made, and the government as well, some of which I will read to you or discuss. I think perhaps I have covered them pretty generally.

You must not draw any inference of guilt as to one or more of the defendants merely because all defendants are indicted and being tried together. I have told you that they

have the right to be tried as if they were separate and I will also say to you before you can find a verdict of guilty under the indictment, you must find it was one general agreement, not a series of different agreements.

The government says it was one agreement to do two things: Violate a law—that is, to give a Congressman compensation and the law says he cannot take it and the other one was to defraud the United States. The result of giving it to him would be that the government does not get the independent, impartial and unbiased services of a Congressman.

Mere association is not sufficient to warrant a verdict of guilty.

I was also asked to tell you, and I do, that Congressman May had a right, as any member of Congress would have, and that he, as Chairman of the House Military Affairs Committee had to make inquiries of various officers and agencies and to inquire about situations pertinent to the position and his duties as a member of the House Military Affairs Committee and so forth. None of that. I do not think, at the moment, of any single overt act alleged or proved which, in itself, was a thing that either by law or otherwise, he did not have a right to do; for instance, specifically telephoning Secretary Patterson, General Campbell. There is nothing illegal about that, in itself. What is illegal about it, if anything, is whether he did it for compensation. That is all.

That is why I told you earlier, really, that this case is as simple a case as you will ever be called upon to hear so far as the issue is concerned. That is all there is to it. He had a right to be in business. He had a right to be in the Cumberland Lumber Company. He had a right to do all these things. In and of themselves there is nothing wrong with them but they are all wrong if he did it for compensation and the government would only have to satisfy you that he did one of those things if you believe there was this illegal agreement. It isn't necessary to prove them all.

I am specifically asked to read this which I will do. It is pretty much what I have already said but I am asked to say this to you and I will.

The mere receipt of funds or moneys by Andrew J. May from either Erie Basin Metal Products, Inc., Batavia Metal Products, Inc., or Henry Garsson or Murray Garsson or any other person in behalf of the Cumberland Lumber Company did not of itself, standing alone, without more, constitute an unlawful act or conspiracy as charged in this indictment. That is all true. You consider those things together with all the other evidence in determining whether there was this unlawful agreement and whether compensation was paid to Mr. May while a member of Congress.

The same is true with respect to the fact that Congressman May acted as process agent. I am asked to call that to your attention and I do. Process agent for Cumberland Lumber Company in Kentucky—that means that every corporation formed out of a state must have what is called a process agent within the state so that, if somebody within the state wants to sue the corporation, there is a man there through whom it can be done by just serving a paper on him. There is nothing illegal or unlawful about that, in and of itself. It is one of those things you take into consideration, with all the other evidence, in determining whether it was done for compensation or whether it indicated he was the real owner of Cumberland Lumber Company, whether this was this agreement and so on.

The government has asked me in several requests to charge you also, one of which I have granted. That, gentlemen, for your information is Government's No. 12. I will read this as given to me.

If you believe that the defendants conspired to defraud the United States, or to violate Section 203 of Title 18, United States Code, as alleged in the indictment, and committed one or more of the overt acts to effect the object of the conspiracy, and if you further believe that the defendants violated Section 203 of Title 18, United States Code, as alleged in the third and fourth counts of the indictment,—if you believe that beyond a reasonable doubt, as I have defined the meaning of that,—you should convict the defendants, irrespective of what your conclusion may be as to the merits of the matters and things concerning which Mr. May contacted the War Department, and irrespective of what you believe as to the contributions, if any, of the defend-

ants, Henry Garsson and Murray Garsson, Erie Basin or Batavia, to the war effort.

For the Court charges you that the law is that if a member of Congress receives compensation, directly or indirectly, for services rendered or to be rendered to any person in any matter, in which the United States is directly or indirectly interested, before a government department, it is immaterial whether the matter pending before the department should or should not be decided favorably to the person in whose interest the congressman rendered or attempted to render services.

Likewise it is immaterial in this case whether or not the contracting corporations were good producers or bad producers, whether or not the "E" awards were merited or unmerited, whether or not the so-called freeze order should or should not have been entered in the first place or should or should not have been rescinded in whole or in part, whether or not Erie Basin or Batavia were improperly or properly restricted in manpower by the Manpower Commission, whether or not the corporations and their officers were discriminated against, whether or not the requests of the War Department in relation to personnel matters, if you believe such requests were made, were justifiable or not, whether or not Henry Garsson was an inventor of manufacturing processes or not, and whether or not the other matters and things testified about were properly or improperly decided by the officials of the War Department.

It was for these reasons that the Court restricted corroboration offered by the defendants and declined to permit the government to introduce evidence in rebuttal as to the facts concerning those various matters.

The Court charges you that in determining whether or not the defendants are guilty as charged in the several counts of the indictment, you should weigh and consider the testimony of Andrew J. May and Henry Garsson as to the motives they assigned for their action in contacting the War Department and causing Mr. May to contact the War Department as disclosed by the testimony in the case, and although it was probably made plain to you during the course of the trial, those are the reasons why that

evidence was offered and why it was limited in one sense on the part of the defendants and why the government was not permitted by the Court to introduce any evidence concerning it.

Its only competency in this case, those various things I have just gotten through talking about when I read the government's instruction, are competent only in order for you to determine whether you believe they were true at all, and if so, whether they or any one of them, all of them or any one of those various matters motivated Henry M. Garsson or Murray Garsson or their representative, Freeman, to go to May to get his help and if you believe that did occur and those situations were as represented by the defendants on the witness stand, and *if you believe* that that is what motivated them to go to Congressman May, then you will decide in your mind whether or not it had any effect, as he said it did, on him; any effect in the sense that it is what caused him, rather than compensation that he received, to make these contacts with the War Department and Manpower Commission and so forth and it is to be given no other consideration by you.

That is one of the things I had in mind when I said to you earlier that this case calls for a high degree of objectivity. It really does. That is one of the things about which you must be objective. It does not matter one iota except in respect of the thing I have just been talking about, whether the Garssons or those companies were the best producers in the land of munitions of war, or the worst; whether the War Department was *terribly* right or *terrilby* wrong in any of the various controversies they said they had. It makes no difference in this case. It should not be permitted by you to affect your judgment at all except only if you believe that they were so and if you believe that is what caused the Garssons to go to May for help and if you believe that is why May gave them the help rather than for compensation.

Another thing that is immaterial is whether or not Congressman May made any money out of the Cumberland Lumber Company or he did not. The question is: Was it a vehicle and a medium by which he could receive some com-

pensation? If it was, then if he lost all the money given to him to put into it plus more of his own, it wouldn't make any difference in the world. Why was he in it? Was he in it as he tells you or was he in it as the government tells you? Look to the evidence for the purpose and the real reason for May's interest and by "interest in," I mean activity on behalf of the Cumberland Lumber Company but it doesn't make any difference and it makes no difference either, if those Cumberland moneys were received by May, it would make no difference that when the property was sold, all of it went back to the Garssons. That wouldn't make any difference either. It is what was the situation at the time the money was paid. Was it then paid as compensation for services either rendered or to be rendered in the future or was it, as the defendants say it was, the building of a new company in order to secure lumber which they needed and which was scarce?

Another thing I must comment upon—and I do not know how this got into the case any more. It is unfortunate that it did but it is in here and, therefore, I must talk to you about it briefly—suggestion has been made to you that the Mead Committee, Senator Mead and his Committee were motivated by political ambitions or for political reasons in making the investigation which that Committee did make—the Senate War Investigating Committee.

That calls for objectivity on your part. That has nothing to do whatever with this law suit. Even if the Mead Committee had set out with no purpose in mind other than the destruction of Congressman May for political reasons, it makes no difference. Why doesn't it make any difference? What counts is the evidence which you hear and the evidence which you have heard. That is what matters. That is all that matters. Not what the evidence was that the Mead Committee had.

You heard it here in the court room. You will decide where the truth of the matter lies. Don't let that affect you. Whether it is true or not, does not make any difference.

Another thing, there have been statements made that Congressman May never got a contract for the companies and that, as a matter of fact, he never really accomplished

anything for them. It does not make any difference whether he did or not, if his purpose in making the contacts was for compensation. That is all. We don't care whether he hit the mark or he missed it. It is whether he did it for that reason and that is the only thing you have got to decide.

One more thing and I think I am through except that I will ask you, when I conclude, to retire for a few minutes because I am sure the lawyers will either tell me I am wrong or I have forgotten something—and I usually do and they are usually right on one or the other of those points. It is this and nothing that I have thus far said is of greater importance.

You have been told by witnesses on the stand, Henry M. Garsson and Mr. May; it has been argued to you by Mr. Sawyer Smith and Mr. Perry Howard and Mr. Margiotti; that the defendants, the Garssons and Erie Basin and Batavia Companies, were discriminated against in the Chicago Ordance District because they were Jewish. Now, whether that is true or not, like these other things I have been talking about, is beside the point and it makes no difference except only, if you believe it was true and if you believe it motivated or was one of the things that motivated Henry or Murray Garsson or Freeman to go to May for his help and if you believe that it was one of the things that caused May to give his help and his services, then for that reason it is competent evidence.

It is limited to that but if anyone of you let the fact that two of these defendants are Jews influence you against them or for them, you will bring dishonor upon yourself and you will bring dishonor upon this Court. So remember that and I think you will have no trouble with that. Don't let yourselves stoop to a consideration as ugly and as foreign to this case except insofar as the limit of its area of admissibility and competency is which I have already described.

Now, gentlemen, I have run out but I am sure you haven't.

I will ask the jury to step out to the jury room for a few moments.

(Thereupon, the jury retired to the jury room at 4:28 o'clock p. m.)

* * * * * * *

(Thereupon, the jury returned to the courtroom at 5:15 o'clock p. m.)

The Court: Ladies and gentlemen, some things have been called to my attention and there were two instructions that I had said I would grant for the defendants and I can't remember whether I did or if I did whether I did it as I intended to. I think they were adequately covered but the first one of them is this:

Conviction cannot be had in this case on suspicion no matter however strong.

The other one is:

The jury must not speculate or guess on the guilt of any of the defendants.

It is thought possible that when I discussed with you the evidence which had to do with the sending of the proceeds from the sale of the Cumberland Lumber Company tract back to the Garssons or the companies, or both, that I may have misled you and it is possible that I did. If I said so, I didn't mean it, that that has nothing to do with the case. If it hadn't anything to do with it, I would have stricken it out of the evidence long since. Of course, it was admissible on the question of who owned the Cumberland Lumber Company.

I am sure you must have understood that. I wasn't telling you to take it out of the case. It is in for that purpose with whatever weight you want to give to it, either as proof that the Cumberland Lumber Company was owned by the defendant, Henry Garsson, or that it wasn't. You give it what weight you think it is entitled to, along with the other evidence, but it is definitely in the case on that question.

This I have neglected to say but I have told you so many times, I guess, I just forgot it in this case.

You know, of course, that you are the sole judges of the evidence in the case but that you must take the law as given you by the Court and it is very important for you not to try to determine from anything I may have said or the way I

may have said it what my opinion of the evidence is. Don't speculate on that any more than you speculate on anything else because, even if I had an idea and had given an impression, it is not my business, so don't let that fact, if you think there was any, by any chance, such impression given you, don't let it interfere or influence you or affect your thinking and voting in the slightest degree.

I think I also made this clear but I may not have and, just in case, I will repeat it.

In discussing the possible verdicts in the case, there are three counts in the case, as I have told you, and the verdicts on all three of them, the possible verdicts on all three counts are—not guilty as to all defendants, each defendant on each of the three counts; guilty as to each defendant on all three counts and, as to Count 1, there is a further possible verdict and this is true as to Counts 3 and 4 also. The other possible verdict is guilty as to one of the Garssons and not guilty as to the other Garrson and that is so in Counts 1, 3 and 4, but in no case in any of the counts, could you find either or both of the Garssons guilty and the Defendant, May, not guilty. In other words, if you find either of them guilty, you can only do so by also finding Congressman May guilty.

That covers them all, doesn't it?

Mr. Margiotti: I think you had covered it before.

The Court: I think so too.

Mr. Magee: A finding as to Congressman May's honesty ends the case because there would be no one else guilty as to these offenses, as I understand it.

The Court: That is right.

Mr. Magee: That ends the case.

The Court: That is right. I said that as clearly as I can imagine that it could be said.

Now, there is one other thing. I have come to the conclusion not to send into the jury room with you these exhibits, for these reasons: You then would have part but not all of the evidence in the case because you have got to depend on your recollection about the testimony that was given on the witness stand and I suppose every document that went in—definitely every document that went into evidence by either the Government or the defendants went in in the

context of testimony concerning that exhibit and, therefore, I think it is not right to let you have part of the evidence in the case when you cannot have it all so you will have to depend on your recollection about the entire case. But if you have any questions from time to time, you can write them out on a slip of paper, give them to the deputy marshal in charge who will give them to me and then I will take them up with counsel and see whether we can answer your question or not and I will tell you whether we can or not.

I have also concluded that it is not good to submit this case to you this evening at the end of a long day when, I am sure, you must be as weary as the lawyers and the reporters and the Judge,—I am sure the Clerk isn't weary. So I am going to let you go home and report tomorrow morning, and that includes you two alternate jurors. You will report tomorrow morning to the jury room that you have been using. Be there at nine o'clock in the morning. Don't discuss the case tonight with anybody under any circumstances, including yourselves. Don't discuss it tomorrow morning until—first I will have to bring you in in the morning and let the two alternate jurors go.

When the twelve of you are finally in the jury room, your first task, as you already know, is to select your foreman and then remember this that I have also told you from time to time: Proceed with some degree of formality but not too much of that, one extreme is as bad as the other, but don't let yourselves at any time get in the position where everybody is talking and nobody is listening; so (take it easy and you won't have any difficulty, I don't suppose.)

Be very careful tonight not to read the papers or to listen to the radio or talk with anybody about the matter and don't talk in the morning about it when you get together in there until you are finally there for the purpose of deliberating.

(Record of proceedings in the United States District Court for the District of Columbia, Volume #47, pages 6946 through 6989 and 7008 through 7013).

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 100

ANDREW J. MAY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 101

MURRAY W. GARSSON, PETITIONER

v.

UNITED STATES OF AMERICA

No. 102

HENRY M. GARSSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority (R. 159-176)[1] and dissenting (R. 176-187) opinions in the Court of Appeals have not yet been reported.

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[1] "R." will be used herein to refer to the printed record, consisting of excerpts from the typewritten transcript of record on appeal, plus the proceedings in the Court of Appeals. References to the original typewritten transcript of record will be indicated by "Tr."

JURISDICTION

The judgments of the Court of Appeals were entered January 24, 1949 (R. 188), and petitions for rehearing were denied April 6, 1949 (R. 189-190). By orders dated April 20, 1949, and April 25, 1949, petitioners' time for filing petitions for writs of certiorari was extended by Mr. Justice Black to and including June 4, 1949 (R. 193-194), and the petitions were filed on the latter date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

The principal questions presented are:

1. Whether a count charging conspiracy (1) to violate 18 U.S.C. [1940 ed.] 203 (making it unlawful for a member of Congress to accept compensation for services rendered in any matter in which the United States is interested) and (2) to defraud the United States, *inter alia,* of its right to the faithful and unbiased services of the member of Congress, is duplicitous.

2. Whether a count charging the receiver and the giver of the compensation, the receipt of which is proscribed by 18 U.S.C. [1940 ed.] 203, with conspiring to violate that statute is defective on the ground that the substantive offense itself necessarily requires "concert of action and agreement between the receiver and the giver"; and

whether, even if so, the point is material in this case in view of the fact that petitioners' sentences on the conspiracy count run concurrently with their sentences on the substantive counts.

3. Whether the one who gives the compensation, the receipt of which is made an offense by 18 U.S.C. [1940 ed.] 203, can properly be convicted of aiding and abetting the receipt.

4. Whether the evidence is sufficient to sustain the convictions.

5. Whether petitioners May and Henry Garsson obtained immunity from prosecution by virtue of their having testified before the Senate War Investigating Committee, prior to their indictment, concerning matters relating to the facts in this case.

6. Whether government exhibit 179, a stenographer's notebook, was unlawfully seized from petitioner Henry Garsson and erroneously received in evidence against him.

STATUTE INVOLVED

18 U. S. C. [1940 ed.] 203 provided in pertinent part:

> Whoever, being elected or appointed a * * * Member of * * * Congress, * * * shall, * * * during his continuance in office, * * * directly or indirectly, receive, or agree to receive, any compensation whatever for any services rendered or to be rendered to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy,

charge, accusation, arrest, or other matter or thing in which the United States is a party or directly or indirectly interested, before any department, court martial, bureau, officer, or any civil, military, or naval commission whatever, shall be fined not more than $10,000 and imprisoned not more than two years; and shall moreover thereafter be incapable of holding any office of honor, trust, or profit under the Government of the United States.

STATEMENT

Count 1 of a 4-count indictment (R. 2-17) filed in the District Court for the District of Columbia charged petitioners and one Freeman with having conspired, in violation of Section 37 of the Criminal Code (18 U. S. C. [1940 ed.] 88), "to commit offenses against the United States, that is, to violate Section 203 of Title 18 of the United States Code [*supra*], and to defraud the United States" (R. 2). The nature of the alleged conspiracy and the manner in which it was carried out were set forth in detail (R. 3-7) and 35 overt acts were alleged (R. 7-12). Count 3[2] charged petitioner May with having received a check for $5,000, in violation of 18 U. S. C. [1940 ed.] 203, *supra* (R. 14-15). Count 4 charged petitioner May with having agreed to receive sums of money totalling $53,634.07, in violation of the same statute (R. 15-

[2] Count 2 was identical with Count 3, except that the $5,000 involved therein was alleged in the former count to have been received in cash (R. 12-14). The Government elected to stand on the third count and abandon the second, as to which, accordingly, petitioners were granted motions for judgments of acquittal (R. 160).

17). Freeman and the petitioners Garsson were charged as aiders and abettors of May in counts 3 and 4 (R. 15, 16-17). Following a trial by jury, petitioners were found guilty on all three of the above counts and each was sentenced to imprisonment for from 8 months to 2 years on each count, the sentences to run concurrently (R. 151-153). Freeman was granted a judgment of acquittal on all counts (R. 160). On appeal to the Court of Appeals for the District of Columbia Circuit, petitioners' convictions were affirmed, one judge dissenting (R. 188).

The evidence adduced by the Government may be summarized as follows:

1. Petitioner Andrew J. May, throughout the period covered by the indictment (1942-1946), was a member of the House of Representatives and Chairman of the House Military Affairs Committee (Tr. 2343). Petitioner Henry Garsson was an officer and director of, and substantial shareholder in, two corporations, Erie Basin Metal Products, Inc., and Batavia Metal Products, Inc. (hereafter referred to as "Erie" and "Batavia," respectively) (Tr. 3641-3644). Petitioner Murray Garsson (Henry's brother) was an officer and director of both corporations (Tr. 810, 5853) and was also their Washington representative (Tr. 4473, 5228). The defendant Freeman was an assistant to Murray Garsson in his latter capacity (Tr. 5227-5228, 5246). Henry Garsson received annual salaries totalling $90,000 from Erie, Batavia, and a

subsidiary of the latter (Tr. 5072-5073). Murray Garsson received annual salaries totalling $55,000 from Erie and Batavia (Tr. 5011-5012). These two companies obtained approximately $78,000,000 in contracts from the War Department during the war (Tr. 3914).

May met Murray Garsson in 1941 (Tr. 2876), and they became close friends, addressing each other by their first names (G. Ex. 178, Tr. 3255). Murray Garsson and Freeman were often in May's office (Tr. 1082, 1693). May met Henry Garsson in 1942 (Tr. 3661), and in conversations with army officers May referred to Henry Garsson as his friend (G. Ex. 140, Tr. 1558; Tr. 1439, 1453).

2. *May's services to the Garssons and their corporations.*—Commencing in 1942 and continuing throughout the war, May intervened with the War Department many times, by letters, telephone calls and personal interviews, on behalf of the Garssons and their two corporations, Erie and Batavia. The evidence showed that May was constantly bringing pressure to bear on officials in the War Department to give war contracts to these companies (e.g., Tr. 1385-1389, 1439, 1479-1480, 1559-1560, 1579, 1784-1785, 1807-1809), protesting contract cancellations, terminations, and cut-backs (e.g., Tr. 1212-1214, 1220, 1229, 1259-1260, 1265, 1284, 1378-1381, 1417-1419, 1464-1467, 1558-1559, 2018-2019, 2136), interceding on behalf of the corporations in manpower disputes (Tr. 1583-1585, 1597-

1598, 1601, 1646, 1666, 1669-1671, 1794-1795, 1801), and the like.

In addition to his services on behalf of the corporations, the evidence showed that May interceded with the War Department and General Eisenhower in connection with a pending court-martial trial of Murray Garsson's son Joseph (Tr. 1702-1703, 1814-1815, 2058-2061); attempted to procure, on behalf of Freeman's son Albert, a furlough to this country from his overseas station (Tr. 1699, 1763, 2167-2168, 2172-2173); summoned a certain army officer to his, May's, office on numerous occasions to discuss with Murray Garsson and Freeman matters involving the transfer, promotion, and assignment of military personnel in whom they were interested (Tr. 1693-1694, 1698, 1738); interceded with Under Secretary of War Patterson in an effort to procure a commission for one Schwamm, a person in whom Murray Garsson was interested (Tr. 1919-1922, 1999-2001, 2022), etc.

3. *Evidence of May's ownership of the Cumberland Lumber Company.*—(a) In April 1943, May mentioned to Leroy Fields, Sr., a lifelong friend and constituent (Tr. 380, 385), that he "was interested in finding a good timber proposition" (Tr. 385). Fields advised May that a certain 2,200-acre tract in Letcher County, Kentucky, which was owned by the Mineral Development Company, could be purchased at $10 an acre (Tr. 386, 395). May told Fields that he had the backing of "big financial interests" from whom he could obtain the

necessary funds (Tr. 386, 567). They agreed that May would obtain the necessary capital for the purchase of this tract (Tr. 388); that a corporation would be organized, the stock of which would be owned equally by them (Tr. 388, 394, 395); and that Fields would manage the property (Tr. 411, 412).

On May 7, 1943, Mineral Development granted an option, covering the land in question, to May (G. Ex. 82, Tr. 1871; Tr. 1878). The option provided for the payment of $1,000 to Mineral Development at the time of execution (*ibid.*). On May 11, 1943, May transmitted to Mineral Development a cashier's check in the amount of $1,000 (G. Ex. 162, Tr. 1857; Tr. 1883). This check had been issued to one Raynes, who purchased the check at Murray Garsson's request and turned it over to the latter (Tr. 1909; G. Exs. 161-163, Tr. 1857). Mineral Development prepared a deed to the property, naming May as grantee, and sent May a copy for his approval (Tr. 2647-2648). At May's request, the grantee was changed to Cumberland Lumber Company, to which May said he was assigning the option (D. Ex. 67, Tr. 2647; Tr. 1876, 1982, 1983).

The purchase price of the land was $21,044.40. Henry Garsson delivered to Mineral Development a cashier's check in the amount of $10,044.40 as the second payment (G. Ex. 19, Tr. 189; Tr. 3685). To cover the $10,000 balance, four promissory notes of Cumberland Lumber Company, signed by Henry

Garsson as "President," each dated July 30, 1943, and in the amount of $2,500, were delivered to Mineral Development (D. Exs. 16, 59-61, Tr. 1965-1967).

(b) The Cumberland Lumber Company was incorporated on June 15, 1943 (G. Ex. 85, Tr. 2177; G. Ex. 170, Tr. 2211) and qualified to do business in Kentucky on August 5, 1943 (G. Ex. 86, Tr. 1096), May being designated as resident agent (G. Ex. 170, Tr. 2211). The corporation was organized by the Corporation Trust Company at the request of one Levin, a Washington attorney, deceased at the time of the trial (Tr. 1091, 1092). On June 15, 1943, Murray Garsson, Freeman, and Levin were named directors, but no stock was issued (Tr. 1094). On January 26, 1945 (G. Ex. 87, Tr. 1098) and again on March 1, 1945 (G. Ex. 88, Tr. 1099), the Corporation Trust Company wrote May for payment of its annual fee from Cumberland Lumber Company, stating in each letter that it had been informed by Levin that he, May, was the "only person interested in maintaining the life of this Corporation." May did not reply to either letter (Tr. 1098), but sent his personal check in payment of the fee on July 2, 1945 (G. Ex. 90, Tr. 1103).

(c) Contrary to the understanding reached with May, Fields never received any stock in the Cumberland Lumber Company. He continued to manage the timber project on a salary basis, however, until March 13, 1944, when May discharged him (G. Ex. 59, Tr. 485; Tr. 415, 488). During this

period, May wrote numerous letters to Fields concerning the affairs of the company and covering such subjects as the purchase of a mill (G. Ex. 37, Tr. 398; G. Ex. 41, Tr. 433; G. Ex. 43, Tr. 437), the location of a mill site (G. Ex. 38, Tr. 402; G. Ex. 51, Tr. 458), the cutting of mine timber (G. Ex. 43, Tr. 437; G. Ex. 44, Tr. 440), the construction of a log chute (G. Ex. 45, Tr. 442, 444, 445; G. Ex. 46, Tr. 445), etc. In various letters May urged Fields to sell certain timber while the price was high (G. Ex. 38, Tr. 402; G. Ex. 39, Tr. 408). In November 1943, May forwarded a letter which he had received from a certain company offering to purchase 200,000 feet of lumber at certain prices (Tr. 457), with the comment that the prices offered did not seem high enough (G. Ex. 50, Tr. 456). But in no instance did May ever instruct Fields to cut lumber for Erie or Batavia (Tr. 406, 407, 434).

May's son succeeded Fields as manager of the project until the former's death in June 1944 (Tr. 620, 637, 638). Then May's nephew, known as "Little Jack," was appointed manager by May on a salary basis (Tr. 606). He served in that capacity until December 1944 (Tr. 607). Lumber was sold during this period (Tr. 618), but at no time did "Little Jack" receive instructions from May to sell or store lumber for Erie or Batavia (Tr. 615, 618).

(d) On April 1, 1945, May and one Brown entered into an agreement whereby Brown would purchase the entire timber project from May for

$32,500, $5,000 to be paid on July 1, 1945, and the balance at the rate of $7 per thousand feet of timber manufactured (Tr. 658).[3] Pursuant to this agreement, Brown entered on the tract and expended considerable of his own funds for operations and equipment (Tr. 670-671). On May 25, 1945, however, May wrote Brown that he had conferred with "his associates" and that they had decided not to sell since they were users of large quantities of lumber (G. Ex. 64, Tr. 671). Previous to this, May had never informed Brown that any one other than himself had an interest in the property (Tr. 667, 668), and had dealt with Brown as if he, May, had been the sole owner (Tr. 669). Brown then demanded that May settle with him in regard to the $4,000 to $5,000 he had spent out of his own funds and take back the property (Tr. 674). May, however, told Brown to remain on the property, as he thought they could arrive at a satisfactory agreement (*ibid.*). Brown stayed on, cutting and selling lumber (Tr. 678). He did not store any lumber for Erie or Batavia (Tr. 679), however, nor did May ever mention those companies to him or any purchase orders from them (Tr. 673).

In the fall of 1945, one Burns offered May $50,000 for the property, which May was willing to accept (Tr. 691-692, 697). Brown, however,

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[3] On April 24, 1945, May wrote Franklin & Co., one of his lumber customers, that "I have sold the property which I owned on Cumberland River in Letcher County, Kentucky, and the new owner will take possession shortly" (G. Ex. 101, Tr. 649).

claimed an interest in the property by virtue of his previous agreements with May and his capital outlays, and May was unwilling to meet the figure Brown demanded by way of settlement (Tr. 694-695). As a result, the sale to Burns was never consummated (Tr. 717). Cumberland Lumber Company brought an ejectment action against Brown in March, 1946 (D. Ex. 21, Tr. 2624). Brown and May appeared at the hearing (Tr. 700) and May offered to settle for $40,000 in cash, Brown to get clear title to the land and all equipment (Tr. 700, 784). Brown accepted the offer and delivered a $40,000 draft to May (Tr. 792).

4. *May's receipt of funds, through the Cumberland Lumber Company, from the Garssons and their corporations.*—(a) On July 8, 1943, Erie issued a check in the amount of $10,000 to Murray Garsson (G. Ex. 3, Tr. 820). This was a "loan" to Murray Garsson, for which he gave his promissory note. Henry Garsson endorsed Murray Garsson's name on this check, and, on July 19, 1943, used the proceeds thereof to purchase a $10,000 cashier's check (G. Ex. 17, Tr. 189; Tr. 185, 192). This cashier's check, payable to Murray Garsson, was used by May on July 26, 1943, to open an account in the First National Bank of Prestonburg, Kentucky, in the name of the Cumberland Lumber Company (G. Ex. 27, Tr. 203; G. Ex. 17, 21, Tr. 202). The check, which had been delivered to May by Murray Garsson (Tr. 2668), bore the endorsements of "Murray W. Garsson" and "Cumberland

Lumber Co.," the latter endorsement being in May's handwriting (Tr. 183, 203). May alone was authorized to draw on the account (Tr. 202). The bank officer who received the deposit asked May who the directors of the Cumberland Lumber Company were and was informed by May that there were none as the company was "merely incorporated" (Tr. 201). May also advised the officer that no stock had been issued, and from the conversation the officer understood that Cumberland was owned by May and his family (Tr. 201, 239).

(b) On July 31, 1943, Erie issued a check in the amount of $10,000 to Henry Garsson (G. Ex. 4, Tr. 820). This was a "loan" to Henry Garsson, for which he gave his promissory note. Henry Garsson used the proceeds of this check to purchase a cashier's check, dated August 6, 1943, payable to himself in the amount of $10,044.40 (G. Ex. 19, Tr. 189). This cashier's check was used to make the second payment (see p. 8, *supra*) to the Mineral Development Company for the purchase by May of the timber tract in Letcher County, Kentucky (Tr. 3685).[4]

[4] In addition to the two $10,000 loans described in (a) and (b), *supra*, Erie had loaned the Garssons each $5,000 in the previous month, June, 1943, issuing a $5,000 check, dated June 6, 1943, to Henry Garsson (G. Ex. 1, Tr. 812) and another $5,000 check, dated June 7, 1943, to Murray Garsson (G. Ex. 2, Tr. 812). The four items, totalling $30,000, were carried by Erie on its books under a loan account until November 30, 1943, when they were charged as "an advance on materials due from Cumberland Lumber Co." (Tr. 820, 821). At the end of the company's 1944 fiscal year, the items were transferred to an inventory account (see pp. 17-18, *infra*) (Tr. 822).

(c) On January 27, 1944, Batavia issued a check in the amount of $5,000 to Cumberland Lumber Company (G. Ex. 8, Tr. 233), pursuant to the request of Henry Garsson, as "an advance on purchases" (Tr. 843). On February 2, 1944, May deposited this check in the Cumberland account in the First National Bank of Prestonburg, endorsing it "Cumberland Lumber Company" (G. Ex. 28, Tr. 233).

(d) On June 9, 1944, Batavia issued a check in the amount of $1,500 to the First National Bank of Batavia in payment of a draft in that amount drawn by May on Batavia in the name of the Cumberland Lumber Company (G. Ex. 9, Tr. 314; G. Ex. 11, Tr. 216). May himself received the proceeds of this draft (Tr. 214, 215). The Batavia comptroller was told by Henry Garsson to pay the draft as "it was an advance" to Cumberland for box lumber (Tr. 320-324).

(e) On July 3, 1944, Batavia issued a check in the amount of $2,500 to Cumberland Lumber Company (G. Ex. 12, Tr. 234) as an "advance on box lumber" (Tr. 326). On July 5, 1944, May deposited this check in the Cumberland account in the First National Bank of Prestonburg, endorsing it "Cumberland Lumber Company, A. J. May" (G. Ex. 29, Tr. 234).

(f) On August 18, 1944, Erie issued a check in the amount of $5,000 to Murray Garsson (G. Ex. 5, Tr. 359; Tr. 881, 882). This check, endorsed by

Murray Garsson and May, was cashed by May on August 22, 1944, and $4,000 of the proceeds was deposited in May's personal account in the National Bank of Washington, Washington, D. C. (G. Ex. 33, Tr. 359). Against this deposit May drew checks for personal expenses, including tuition, taxes, hotel rent, photographs, and association dues (Tr. 3021-3024). The total of these withdrawals was approximately $1,300 (Tr. 3024). In explanation, May testified that a few days after receiving the check in question he was asked by Levin, the attorney who incorporated the Cumberland Lumber Company (deceased at the time of the trial), to pay his fee and that he wanted it in cash (Tr. 2684); and that he gave $1,300 in cash, which he had in a lock box in his office, to Freeman to deliver to Levin (Tr. 2684, 3024). Freeman testified that he received the money from May and delivered it to Levin (Tr. 6010-6013). However, neither Levin's cash book (G. Ex. 187, Tr. 6222) nor his income tax return for 1944 (G. Ex. 186, Tr. 6244), which the Government introduced in evidence in rebuttal, reflected the receipt by Levin of such a fee.

It was the $5,000 check described in (f), *supra,* on which count 3 (R. 14-15) of the indictment was predicated.

(g) On November 18, 1944, Erie issued a check in the amount of $3,156.47 to Cumberland Lumber Company (G. Ex. 6, Tr. 222). On December 11, 1944, May deposited this check in his personal

checking account in the First National Bank of Prestonburg (G. Ex. 23, Tr. 222). This amount represented the difference between the total amount of certain invoices of Cumberland to Erie for alleged lumber purchases ($33,156.47) and the $30,000 originally carried by Erie as "loans" to the Garssons but later charged as "an advance on materials due from Cumberland Lumber Co." (see footnote 4, *supra,* p. 13) (Tr. 815-816). The invoices were marked "paid" following payment of this check (Tr. 815).

(h) On March 9, 1945, Batavia issued a check in the amount of $1,850 to Cumberland Lumber Company (G. Ex. 14, Tr. 224). On March 14, 1945, May deposited this check in his personal checking account in the First National Bank of Prestonburg (G. Ex. 24, Tr. 224). Against this deposit May drew checks for payment of sundry personal expenses, such as a department store bill, hotel bill, income taxes, etc. (Tr. 3014-3017).

(i) On July 2, 1945, Batavia issued a check in the amount of $4,627.60 to Cumberland Lumber Company (G. Ex. 15, Tr. 229). On July 7, 1945, May deposited this check in his personal account in the Prestonburg Bank (G. Ex. 25, Tr. 229). May also drew checks against this deposit for personal obligations (Tr. 3027-3028).

5. *The fictitious transactions of the Cumberland Lumber Company with the Garssons' corporations.*

(a) *Erie.*—On October 29, 1943, Erie issued its

purchase order No. 7117 to the Cumberland Lumber Company for designated quantities of box lumber (G. Ex. 103, Tr. 824). The order contained the following statement: "The $30,000 paid you [see *supra,* pp. 12-13, and footnote 4] shall be considered an advance payment against this order and lumber shall be stored for our account until dry and pending shipping instructions." At the time of the issuance of this order, the mill on the Cumberland timber tract had not yet been erected (Tr. 458). Neither Fields, who managed the Cumberland project until March 1944 (*supra,* p. 9) nor May's nephew, "Little Jack," who managed it from June to December 1944 (*supra,* p. 10), ever saw this order (Tr. 437, 610). May himself testified he never saw it until the trial and knew nothing about it (Tr. 2845, 3116). Glick, an Erie official, was "certain" that the order was delivered to Henry Garsson rather than sent to Cumberland (Tr. 830). The Government introduced in evidence a purchase order from Erie to another company, bearing the same number and date as that issued to Cumberland (G. Ex. 104, Tr. 887), which the evidence showed was genuine and legitimate (Tr. 925-930).

The $30,000 in "loans" advanced to the Garssons by Erie in June and July 1943 (*supra,* pp. 12-13, and footnote 4) had, at the end of the fiscal year 1943, been charged on Erie's books as "advances" on purchases (Tr. 830). Glick, prior to the date of the 1944 closing of the books, inquired of Henry

Garsson several times whether the item should be treated in the books as in the previous fiscal year, or whether there would be an invoice and evidence of delivery of the material (Tr. 830). In November 1944, Henry Garsson delivered three invoices of Cumberland to Glick, stating that the lumber was being stored for Erie at Whitesburg, Kentucky (Tr. 816, 830, 831, 834). The invoices were dated October 11, October 23, and November 2, 1944 (G. Exs. 105-107, Tr. 825-827), and totalled $33,156.47. A check for $3,156.47 (balance above the $30,000 in "advances") was then made out (G. Ex. 6, Tr. 222) and was eventually received by May (see pp. 15-16, *supra*). The invoices were then marked "paid" (Tr. 815). No lumber, however, was ever delivered to Erie under these invoices (Tr. 825, 831).

(b) *Batavia.*—In February and March 1944, Batavia issued to Cumberland two purchase orders for lumber (G. Exs. 109, 110, Tr. 849). The Government introduced in evidence a Cumberland invoice to Batavia, dated March 29, 1945, in the amount of $10,850 (G. Ex. 108, Tr. 933). As of that date Batavia had made four "advances" to Cumberland, totalling $10,850 (G. Exs. 8, 9, 12, 14, Tr. 233, 314, 234, 224; see (c), (d), (e), and (h), *supra,* pp. 14, 16). In November 1945, O'Connor, a Batavia employee, was instructed by Henry Garsson to insert in Batavia's inventory book a sheet indicating that, as of April 30, 1945, there

was a lumber inventory of $10,850 (Tr. 939). Garsson told O'Connor that the purpose of this was to have "a page in there in the same handwriting as the rest of the inventory to show to the [Senate War Investigating] Committee" (Tr. 940). O'Connor did as instructed (G. Ex. 111A, Tr. 941). No lumber, however, was ever delivered to Batavia under this invoice (Tr. 1051, 1073).

ARGUMENT

1. Petitioners contend (May Pet. 34-35; Henry Garsson Pet. 47-51; Murray Garsson Pet. 14-15) that the conspiracy count is duplicitous because it charges that the object of the conspiracy was twofold, *i.e.*, to violate 18 U.S.C. [1940 ed.] 203 and to defraud the United States. We submit that the contention is without merit. "Countenance we believe has been given by some Courts to the notion that a single count in an indictment for conspiring to commit two offences is bad for duplicity. This Court has given it none. [Citing cases.] The conspiracy is the crime, and that is one, however diverse its objects." *Frohwerk* v. *United States,* 249 U.S. 204, 209-210; *Braverman* v. *United States,* 317 U.S. 49, 54; *Pinkerton* v. *United States,* 328 U.S. 640, 642-643; *United States* v. *Manton,* 107 F. 2d 834, 839 (C.A. 2), certiorari denied, 309 U.S. 664.

This is not a case in which the substantive offense alleged to be an object of the conspiracy charged—for example, theft from an interstate

shipment—bears no logical relation to defrauding the United States, with which it is linked as an objective of the conspiracy. On the contrary, violation of 18 U.S.C. [1940 ed.] 203—prohibiting a member of Congress from accepting compensation for services rendered in any matter in which the United States is interested—bears an obvious relation to defrauding the United States of its right to the faithful and unbiased services of a member of Congress and officers of the War Department, the defrauding charged (R. 3-5). Consequently the conspiracy charge here is analogous to the conspiracy charge in the *Manton* case, *supra* (conspiracy to obstruct the administration of justice, in violation of 18 U.S.C. [1940 ed.] 241, and to defraud the United States of its right to the faithful and unbiased services of a federal judge), and is clearly not duplicitous.

2. The dissenting judge below was of the view that the conspiracy count in this case is defective for a further reason. His reasoning and conclusion are stated in the following passage of his opinion (R. 180):

> The offense against the United States, violation of 18 U.S.C. § 203 (1946) [*supra,* pp. 3-4] which the defendants are in Count I charged with having conspired to commit is one requiring, from its very nature, concert of action and agreement between the parties involved. The offense is receipt of compensation by a member of Congress for services rendered or

> to be rendered. But receipt of compensation cannot be accomplished without compensation also being given and requires therefore concert of action and agreement between the receiver and the giver. This being so, it is not legally possible to make the commission of such an offense the subject of a conspiracy charge. It is like charging a conspiracy to conspire.

Petitioners now adopt this argument (May Pet. 35-37; Henry Garsson Pet. 54-61; Murray Garsson Pet. 9-12). We submit, however, that the reasoning of the majority opinion below on this issue (R. 165-167) is the sounder, and that there are several answers to the dissenting judge's argument.

(a) In the first place, the argument would seem to be squarely refuted by Mr. Justice Holmes' statement in *United States* v. *Holte,* 236 U.S. 140, 145, that "a conspiracy with an officer or employe of the government or any other for an offence that only he could commit has been held for many years to fall within the conspiracy section, now § 37 of the penal code [citing cases]." See also *Ex parte O'Leary,* 53 F. 2d 956, 957 (C.A. 7), certiorari denied, 283 U.S. 830.

(b) Secondly, it does not follow, we submit, from the fact that there cannot be a receiver of compensation without there also being a giver, that to accuse the giver and the receiver with conspiring to violate a statute which prohibits the

receipt of compensation under specified conditions "is like charging a conspiracy to conspire." True, the receipt of compensation necessarily implies the giving thereof, and the receipt and giving will normally be preceded by agreement. But to charge the two actors in the transaction with conspiring to effect the recipient's act of receiving is not the same thing as to charge them with conspiring to enter into this agreement. 18 U.S.C. [1940 ed.] 203 (the statute which petitioners were charged with conspiring to violate), it is to be observed, itself proscribes both receiving and agreeing to receive (*supra*, pp. 3-4). If count 1 had charged a conspiracy to commit the latter offense (agreeing to receive), the dissenting judge's criticism of the count might have merit. Manifestly, however, it was the former offense (receiving) that was charged as the object of the alleged conspiracy.

(c) Thirdly, *United States* v. *Dietrich*, 126 Fed. 664 (C. C., D. Neb.), on which the dissenting judge relies in this respect (see R. 180-184), involved a charge of conspiracy to violate a statute which specifically proscribed both the receipt and the giving of compensation for certain forbidden purposes (as well as agreement to do either). The decision is therefore distinguishable from the present case, which involves a substantive statute that is silent in respect of giving.

(d) Fourthly, even if the dissenting judge's point were otherwise well taken, the fact remains

that the conspiracy charged by count 1 had for its purpose not only the violation of a specific statute but also the defrauding of the United States (*i.e.*, of and concerning its right to the unbiased services of Congressman May and officials in the War Department (see R. 3-5)). And, as observed by the majority below (R. 167), "the United States can be defrauded without concert of action."

(e) Finally, even if it were true that the conspiracy count is defective for the reasons assigned by the dissenting judge, and even if the alleged conspiracy "merged" in the substantive offenses alleged in counts 3 and 4, as petitioners urge in a cognate contention (May Pet. 35; Henry Garsson Pet. 54), the judgments of conviction still could not be successfully assailed. Each petitioner received an identical sentence of imprisonment under each count, and all sentences were directed to be served concurrently. It is settled law that under such circumstances any good count will sustain the sentences imposed. *Hirabayashi* v. *United States,* 320 U. S. 81, 85; cf. *Pinkerton* v. *United States,* 328 U. S. 640, 641-642, note 1.

3. Petitioners Henry Garsson (Pet. 61-66) and Murray Garsson (Pet. 12-14) further contend that they were improperly charged and convicted on the two substantive counts, 3 and 4, because the statute on which those counts were based (18 U. S. C. [1940 ed.] 203, *supra,* pp. 3-4) denounces only the improper receipt of compensation for services rendered, and does not make criminal the giving of

such compensation.[5] But they, as givers of the compensation, certainly aided and abetted May's receipt thereof, as count 3 [6] charged (R. 15). Under 18 U. S. C. [1940 ed.] 550,[7] therefore, they were equally guilty with May and in fact principals in May's offense.[8] This statute, as remarked by the majority below (R. 167), "provides that whoever aids or abets the commission of any act constituting an offense defined in any law of the United States, is a principal in the offense. No language in the statute before us [*i.e.*, 18 U. S. C. [1940 ed.] 203] makes an exception to that general provision. To sustain appellants' contention, we would have to write, or read, such an exception into the otherwise unqualified general statute dealing with aiders and abettors. We think we cannot do that."

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[5] Petitioner May also argues this point (Pet. 37-39), but since he comes squarely within the proscription of the statute on which counts 3 and 4 are founded, the argument clearly cannot avail him. The dissenting judge below seems to have concluded otherwise (R. 186-187), but we submit that his reasoning on this point does not support the conclusion reached.

[6] Count 4 charged May with "agree[ing] to receive" specified sums in compensation for services rendered, and the Garssons with aiding and abetting such "agreement" (R. 15-17). For the sake of simplicity, only count 3 will be considered in this connection. This is permissible, as we pointed out at p. 23, *supra*, since the sentences on these two counts are identical and run concurrently.

[7] "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal."

[8] It is well settled that, though a person may be incapable of committing a particular crime, he still may aid and abet its commission and hence be liable as a principal. *Gebardi* v. *United States*, 287 U.S. 112, 120-121, footnote 5; *Barron* v. *United States*, 5 F. 2d 799, 802 (C.A. 1).

It is true that a person's *mere acquiescence* in another's crime, which by its nature cannot be committed without such acquiescence, does not render the person so acquiescing punishable either as a principal or co-conspirator. Thus, it was held in *Gebardi* v. *United States,* 287 U. S. 112, that a woman who is the willing object of a transportation which violates the Mann Act, but who does not aid or assist in the transportation otherwise than by her consent, is not properly chargeable either as a principal in the offense or as a co-conspirator with the principal in its commission. Similarly, "It is not to be supposed that the consent of an unmarried person to adultery with a married person, where the latter alone is guilty of the substantive offense, would render the former an abettor or a conspirator, * * * or that the acquiescence of a woman under the age of consent would make her a co-conspirator with the man to commit statutory rape upon herself." *Id.,* at p. 123. But where there is something more than mere acquiescence—as, for example, where the willing woman in a Mann Act case "should suggest and carry out [the] journey * * * in the hope of blackmailing the man, and should buy the railroad tickets, or should pay the fare * * *"—it is settled that there is no legal obstacle to charging the necessary partner in the criminal venture either as an aider and abettor or as a co-conspirator. *United States* v. *Holte,* 236 U. S. 140, 145; cf. *Gebardi* v. *United States, supra,* at 117. We submit that the instant case is one that

is clearly outside the scope of the *Gebardi* decision and the adultery and statutory rape cases considered in that opinion.[9] Nor, we think, does it come within the principle of those cases (see *Gebardi* v. *United States, supra,* at 119) which hold that the purchaser of liquor is not to be regarded as an abettor of the illegal sale. The question is essentially one of the intent of Congress, and, as the opinion of the court below makes clear (R. 167-168), the legislative history of the statutes here concerned does not support the inference that Congress had an unspoken intent to make the active aiding and abetting of the offense proscribed by section 203 of Title 18 an exception to the provisions of section 550 of that title. An intent which may reasonably be imputed to Congress where the question is whether a purchaser of a bottle of liquor from a bootlegger is to be punished as severely as the bootlegger himself cannot reasonably be inferred as to the immensely more serious and dangerous acts here concerned. It is equally unrealistic to liken one who pays a Congressman compensation for service rendered—compensation which it is criminal for the Congressman to accept—and thereby procures vast financial advantages at the expense not only of his competitors but of the nation itself, to the acquiescent female victim in the Mann Act,

[9] The *Gebardi* decision, it is to be noted, was based solely on the Court's belief that "the failure of the Mann Act to condemn the woman's participation in those transportations which are effected with her mere consent" evidenced "an affirmative legislative policy to leave her acquiescence unpunished" (287 U.S. at 123).

adultery and statutory rape cases with which the *Gebardi* decision was concerned. He clearly does more than "merely acquiesce" in the recipient's offense; he actively aids and abets the commission of the offense.

It is argued, however, that Congress' failure specifically to denounce the giving of compensation in 18 U. S. C. [1940 ed.] 203 evidences an intent to leave the giving unpunishable notwithstanding the aider-and-abettor statute. The fact that a related statute, 18 U. S. C. [1940 ed.] 202 (proscribing the receipt of money or other consideration by members of Congress and others for procuring any contract or appointive office for any person), specifically denounces both the receipt and the giving of such consideration is pointed to as further evidence of such a congressional intent. Concededly, as the majority below observed (R. 168), there would be some force in this argument "if the two sections had been adjoining sections in the same original congressional enactment." But, as the majority also pointed out (*ibid.*), such is not the case. The two sections adjoined in the Criminal Code of 1909 (§§ 112 and 113) and in the Revised Statutes (§§ 1781 and 1782), but were originally enacted on different occasions—the one on July 16, 1862 (c. 180, 12 Stat. 577; amended February 25, 1863, c. 61, 12 Stat. 696) and the other on June 11, 1864 (c. 119, 13 Stat. 123).

4. Petitioners all challenge the sufficiency of the evidence to sustain their convictions (May Pet. 10-

11, 40; Henry Garsson Pet. 24; Murray Garsson Pet. 7). The Government's proof of the existence of the conspiracy charged, however, was, we submit, clear and compelling. The evidence summarized in the Statement, *supra,* at pp. 5-19, is by no means exhaustive, but it suffices to show that the trial court was plainly warranted in submitting the case to the jury. That the evidence was circumstantial is of course not a valid criticism of its sufficiency, since the existence of a conspiracy, from the very nature of the crime, can rarely be established by direct proof. *United States* v. *Manton,* 107 F. 2d 834, 839 (C. A. 2), certiorari denied, 309 U. S. 664. The evidence under substantive count 3 is also clearly sufficient (see paragraph (f), *supra,* pp. 14-15), and there is no occasion to demonstrate the sufficiency of the proof under the other substantive count, 4, since each petitioner's sentence on the latter count is identical with his sentence on the former, and runs concurrently with it.[10]

5. Petitioners May and Henry Garsson both testified before the Senate War Investigating Committee (the so-called Mead Committee), prior to their indictment, concerning various matters relating to the facts in this case. May testified voluntarily. Henry Garsson appeared under subpoena,

[10] We mention the substantive counts in this connection, notwithstanding that each petitioner's sentences on all counts are identical and run concurrently, for the reason that violation of 18 U.S.C. [1940 ed.] 203, on which the substantive counts are predicated, renders the offender incapable thereafter of holding "any office of honor, trust, or profit under the Government of the United States"—a disability not incurred as a result of conviction on the conspiracy count.

and, it appears, "made a general statement claiming and refusing to waive 'his constitutional privilege' [against self-incrimination]" (R. 164, 161-162). Nevertheless, Henry Garsson "did not refuse to answer any question; so far as the record shows, he was not compelled" (R. 164). These petitioners now contend that, by virtue of their having testified before the Committee, they automatically obtained immunity from prosecution for the offenses of which they have been convicted (May Pet. 30-32; Henry Garsson Pet. 68-74). The contention is clearly without merit.

There is no statute, applicable to testimony before a congressional committee, comparable to those involved in *Smith* v. *United States,* No. 292, 1948 Term, decided May 31, 1949, and *United States* v. *Monia,* 317 U. S. 424, whereby self-incriminating testimony may be compelled, and in exchange, as it were, for such deprivation of what would otherwise be a constitutional right, there is conferred immunity from prosecution "for or on account of any transaction, matter, or thing" concerning which testimony is given. These petitioners' attempt to "spell out" such immunity from two statutes—28 U.S.C. [1946 ed.] 634[11] and 2 U.S.C. [1946 ed.] 192[12]—is

[11] "No testimony given by a witness before either House, or before any committee of either House, * * * shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege."

[12] "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony

patently futile. The former is simply what it purports to be—a statute forbidding the use of a witness' testimony before a congressional committee in any subsequent criminal proceeding against him; it does not confer immunity from prosecution. *Counselman* v. *Hitchcock,* 142 U.S. 547, 564-565, 585-586. The latter makes it an offense to refuse to divulge pertinent information to a congressional committee; but it cannot constitutionally be construed, by virtue of the bar of the Fifth Amendment, to apply to self-incriminating testimony. *Counselman* v. *Hitchcock, supra.* In fact, it is precisely for the purpose of compelling self-incriminating testimony that immunity statutes have been enacted. *Smith* v. *United States, supra; Shapiro* v. *United States,* 335 U.S. 1, 28-29; *Brown* v. *Walker,* 161 U.S. 591, 594-595. And, as we have indicated, no such statute has been enacted relative to testimony before a congressional committee. Consequently, neither May nor Henry Garsson could have been compelled to incriminate himself before the Mead Committee. Indeed, the fact that Henry Garsson stated to the Committee that he was not waiving his constitutional privilege against self-incrimination shows that he was well aware of that fact. This case, therefore, simply

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or to produce papers upon any matter under inquiry before either House, * * * or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine * * * and imprisonment * * *."

does not involve any question of immunity.[13]

6. Petitioner Henry Garsson contends (Pet. 79-83) that a certain stenographer's notebook (G. Ex. 179, Tr. 5909) was erroneously received in evidence. He charges that it was his personal property and was unlawfully seized without a warrant. The contention is clearly without merit.

The notebook in question was one of a large number of items taken by agents of the Government from Batavia Metal Products, Inc., pursuant to a subpoena *duces tecum* directed to that company. The items were voluntarily surrendered by attorneys for the company. Some of the items subsequently proved to be personal property of Henry Garsson and were returned to him. Others, including the notebook in question, were not re-

[13] A related contention of petitioners May (Pet. 32-34) and Henry Garsson (Pet. 73-74) is that "testimony given" by them before the Mead Committee was used against them in this prosecution, in violation of 28 U.S.C. [1946 ed.] 634 (quoted in pertinent part in footnote 11, *supra*, p. 29). However, neither refers to any specific testimony given by him before the Committee and allegedly used by the prosecution against him in this case, and in fact there was none. It is not true that "It has never been denied by the prosecution that [May's] testimony [before the Committee] was used before the grand jury" (May Pet. 33). On the contrary, the prosecution categorically denied this charge, made in connection with several pre-trial motions attacking the indictment (R. 38; see also Transcript of proceedings on February 21 and 25, 1947, pp. 109-111). Both these petitioners also suggest (May Pet. 33; Henry Garsson Pet. 73-74) that some of the evidence presented by the Government to the grand jury resulted from "leads" obtained from their testimony before the Committee. It is not necessary, however, to consider whether, even if this were true, it was forbidden by the statute in question, since in each instance the suggestion is sheer speculation.

turned for the reason that they were corporate property of Batavia and hence properly received under the subpoena. (See Transcript of proceedings on April 3 and 9, 1947, pp. 53-81.) There can be no doubt that this notebook was corporate property and contained notes of corporate business. See Henry Garsson's testimony on cross-examination at the trial (Tr. 4458-4462). It was therefore properly taken pursuant to the subpoena. *Wilson* v. *United States*, 221 U.S. 361.

We have thus far discussed and answered what we consider to be the principal contentions of the petitions for certiorari. Petitioners make a number of other contentions, but to answer each in detail would unduly lengthen this brief in opposition to certiorari. We think it is unnecessary to do so. Each of the remaining contentions is carefully examined and rejected in the majority opinion below, which in our judgment fully demonstrates their lack of merit. None of these contentions, moreover, was found meritorious by the dissenting judge, whose opinion was based entirely on what he thought were defects in the indictment (R. 176). We have already discussed each of these alleged defects. For the convenience of the Court, we set forth below the nature of petitioners' additional contentions, references to the pages of the petitions in which they are made, and references to the majority opinion where they are considered:

(1) Alleged illegal constitution of the grand jury (May Pet. 39-40; Henry Garsson Pet. 75-78; Murray Garsson Pet. 15-16); considered below at R. 164.

(2) Refusal to strike all the evidence concerning the acquitted codefendant Freeman (May Pet. 43-45; Henry Garsson Pet. 84-85); considered below at R. 169.

(3) Exclusion of evidence as to alleged discrimination by the War Department against the Garssons' companies, the excellent production records of the companies, the functions of the Military Affairs Committee, justification of the complaints made to May by the Garssons, etc. (May Pet. 46-49); Henry Garsson Pet. 97-104); considered below at R. 172-173; see also R. 170.

(4) Alleged errors in admitting evidence (Henry Garsson Pet. 86-96); considered below at R. 169-170.

(5) Alleged errors in the charge and refusal to grant certain requested instructions (May Pet. 49-51; Henry Garsson Pet. 112-123); considered below at R. 176.

(6) Alleged unfairness of the trial (May Pet. 51-52; Henry Garsson Pet. 105-111); considered below at R. 173-175.

CONCLUSION

The petitions for writs of certiorari do not, in our opinion, present any question requiring further review by this Court. We therefore respectfully submit that they should be denied.

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JULY 1949.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1949 944830

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 101.

MURRAY W. GARSSON, *Petitioner,*

v.

UNITED STATES OF AMERICA.

No. 102.

HENRY M. GARSSON, *Petitioner,*

v.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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v.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Murray W. Garsson and Henry M. Garsson, Petitioners, respectfully pray for a rehearing and reversal of the orders hereinbefore entered on the 10th day of October, 1949, denying their Petitions for Writs of Certiorari to the

United States Court of Appeals for the District of Columbia and as grounds for such rehearings set forth the following:

I.

That two of the principal questions presented for decision by this Court concerned the interpretation and construction of two groups of statutes: (a) R. S. 1782, March 4, 1909 c. 321 Section 113, 35 Stat. 1109, as amended (18 U. S. C. A. 203) and, (b) R. S. 102, as amended June 22, 1938, c. 594, 52 Stat. 942 (2 U. S. C. A. 192); R. S. 103, as amended June 22, 1938, c. 594, 52 Stat. 942 (2 U. S. C. A. 193), and R. S. 859, as amended June 22, 1938, c. 594, 52 Stat. 943 (28 U. S. C. A. 634). 18 U. S. C. A. Section 203 prohibits a Congressman from receiving or agreeing to receive any compensation for services in any matter in which the United States is interested. The statutes in group (b) pertain to testimony given by a witness before a Congressional Committee.

The Petitions for Writs of Certiorari in the above cases raise many questions of substance relating to the interpretation, construction or application of said statutes, were denied. It may be that this action was taken on the ground that there was no conflict of decision among the various Courts of Appeals relative thereto. Although the importance of the questions relative to these statutes was presented in the Petitions, petitioners did not argue that prosecutions elsewhere with the resulting conflict of decision was improbable because such statutes would be most likely to be violated only in the District of Columbia. Because of the concentration of Governmental departments, bureaus and agencies in the District of Columbia, and of the time spent by members of Congress in said District, it is most probable that 18 U. S. C. A. Section 203, if violated, would be violated in that District. Also, because of the existence of the foregoing facts, Congressional investigations will be held most probably in said District rather than elsewhere in the United States.

This Court's attention is called to the fact that this case was the first prosecution by the Government under 18 U. S. C. A. 203 of a person other than a Congressman, against whom the prohibition of that Section is specifically directed. There is no decision by this Court on the question whether any one other than a Congressman may be indicted under 18 U. S. C. A. 203 as an aider and abettor. In the absence of the probability of a conflict of decision in other Courts of Appeal, and in view of the probability that such prosecutions will be brought only in the District of Columbia, it is important to the administration of justice that this Court grant certiorari in these cases in order that an important question of Federal administration be decided and settled.

The preceding ground for rehearing constitutes a substantial ground, which was available to petitioners although not previously presented in their Petitions for Writs of Certiorari. Said ground is analogous to that presented in the petition for rehearing in the case of *Schriber-Schroth Company* v. *Cleveland Trust Company,* 305 U. S. 47, 573; 59 S. Ct. 810, in which this Court granted certiorari on a petition for rehearing showing that, notwithstanding the doubtful validity of certain patents, "litigation elsewhere with the resulting conflict of decision was improbable because of the concentration of the automobile industry in the 6th Circuit."

II.

That a further reason for granting a rehearing is an intervening circumstance of substantial and controlling effect —that since the filing of the Petitions on June 3, 1949, the Supreme Court, on June 27, 1949, in the case of *Eugene Dennis, Petitioner* v. *United States of America,* at No. 436, October Term, 1949, granted a Petition for Writ of Certiorari to the Court of Appeals for the District of Columbia, limited to the question whether Government employees could properly serve on the jury which tried the petitioner.

This decision by this Court bears on the question presented in petitioners' briefs (Henry M. Garsson Brief, 75-79, Murray W. Garsson Brief, 15) whether the petitioners were indicted by an illegally constituted Grand Jury. The Court of Appeals in summarily rejecting petitioners' challenge of the composition of the Grand Jury on the ground that is consists of more than half of Government employees, and that two of its members were completely disqualified, followed the decision in *Frazier* v. *United States,* 335 U. S. 497, that Government employees are eligible to sit as jurors.

The Court of Appeals in the *Dennis* case, 171 Fed. (2d) 986, 991-992, upheld the District Court's action in overruling the challenge of all talesmen who were Government employees. Petitioners maintain that the granting by this Court of certiorari in the *Dennis* case shows a departure from its decision in *Frazier* v. *United States,* 69 S. Ct. 201. This Court's action shows a growing apprehension and realization of the obstacles to a fair trial presented by a petit jury composed principally of Government employees. This Court's attention is also called to dissenting opinions by Judges Jackson, Frankfurter, Douglas and Murphy in the *Frazier* case. Mr. Justice Jackson particularly pointed out the danger of a "packed jury" where the offense was against no one except Federal Government policy, i.e. the Secretary of the Treasury. Judge Jackson, in his dissenting opinion, states, 69 S. Ct. 201, 210:

> "On one proposition I should expect trial lawyers to be nearly unanimous: that a jury, every member of which is in the hire of one of the litigants, lacks something of being an impartial jury. A system which has produced such an objectionable result and always tends to repeat it, should, in my opinion, be disapproved by this Court in exercise of its supervisory power over federal courts."

The dangers inherent in the Grand Jury investigation and in the trial of cases in the District of Columbia involv-

ing offenses against no one except Federal Government policy—[in these cases, particularly against the General Accounting Office]—make it impossible for defendants charged with such offenses to receive a fair trial in said District at the hands of either a Grand Jury or a petit jury composed largely of Government employees. The Mead Committee investigation, which preceded the Grand Jury investigation and the trial itself, publicized unsworn and rash statements made by members of the investigating committee. The publicity given to the Mead Committee hearings was so widespread that no one in the District of Columbia at that time could have been ignorant of the charges made against these defendants. Comments made by members of the Committee were powerful enough to prejudice both the Grand Jurors and the petit jurors against these defendants before the trial even started.

Objections were made in these cases to the composition of both the Grand Jury and the petit jury. Said juries had a one-sided outlook on the case before them. The petitioners were deprived of a fair and impartial trial not only because they were tried by a jury, most of those members were prejudiced against them, but also by jurors whose minds could not have helped but be biased against the petitioners as a result of comments made during the Mead investigation.

In view of this Court's action in granting certiorari in the *Dennis* case, limited to the question whether Government Employees could properly serve on the jury which tried petitioner therein, petitioners in the above cases maintain that there is more reason for granting certiorari in their cases—because in the *Dennis* case at least the defendant had the opportunity to examine the petit jurors for possible bias. Such an opportunity was not available in the case of the Grand Jury which indicted our petitioners.

III.

That a further reason for granting a rehearing as to petitioner Henry M. Garsson is that since the filing of his Petition, the Government in its brief (Br. 28-31) admits that petitioners May and Henry Garsson both testified before the Senate War Investigating Committee prior to their indictment concerning various matters relating to the facts in this case, that Henry Garsson appeared under subpoena, and, "made a general statement claiming and refusing to waive 'his constitutional privilege' (against self-incrimination)" (R. 161-162, 164). Although the Government contends that the two statutes involved, 28 U. S. C. A. 634 and 2 U. S. C. A. 192 do not "spell out" immunity from prosecution "for or on account of any transaction, matter, or thing" concerning which testimony is given before a Congressional Committee, nevertheless it does stress that Henry Garsson "did not refuse to answer any question; so far as the record shows he was not compelled" (R. 164). The Government's position is thus most inconsistent. It recognizes by the last statement that the statutes do grant immunity; otherwise it would not have had to argue that Henry Garsson "did not refuse to answer any question" after he had made a general statement claiming and refusing to waive his constitutional privilege. Respondent argues that Henry Garsson did not obtain immunity because he was not compelled to give the testimony which he did. This argument and the decision in the Court below on this point are difficult to understand.

This Court has ruled in *Smith* v. *United States*, 292 1948 Term decided May 31, 1949, 69 S. Ct. 1000, and in *United States* v. *Monia*, 317 U. S. 424, that it is not necessary for a witness each time a question is asked to raise the constitutional question involved and then be forced to answer before immunity attaches in the giving of testimony before a Congressional Committee. The Government's argument that the statutes herein relied on to give petitioner Henry Garsson immunity—28 U. S. C. A. 634, and 2 U. S. C. A.

192—are not comparable to the statutes involved in the *Smith* and *Monia* cases is fallacious.

Next the respondent argues that no immunity statute has been enacted relative to testimony before a Congressional Committee and that, consequently, neither May nor Henry Garsson could have been compelled to incriminate himself before the Mead Committee, if he raised the constitutional question. And yet in two recent cases, wherein Petitions for Writs of Certiorari are pending in this Court, *Lawson* v. *United States* and *Trumbo* v. *United States,* 176 Fed. (2d) 49 (C. C. A. D. C.) the Government brought prosecutions for violations of 2 U. S. C. A. Section 192, 52 Stat. 942 (1938), which makes it a misdemeanor to refuse to answer "any question (of a Congressional Committee) pertinent to the question under inquiry". Thus, using the very statutes herein involved, respondent indicted, tried and convicted for contempt witnesses before Congressional Committees, who, in reliance upon their constitutional right, refused to answer questions put to them by such Committee.

The position of the Solicitor General in upholding the constitutionality of 2 U. S. C. A. 192 in the *Lawson* and *Trumbo* cases and, in effect, attacking the constitutionality of the same statute in our cases because it is not an immunity statute within the so-called definitions of the *Smith* and *Monia* cases, presents a question of importance in the administration of Federal criminal justice which should be decided by this Court.

Petitioner Henry Garsson maintains that he comes within the protection given by this Court to the defendant in the *Smith* case, because it is plain that he relied from the beginning of his examination upon his privilege against self-incrimination. The United States had notice that the witness sought protection against prosecution for any facts to which he was compelled to testify. As stated by this Court, 69 S. Ct. 1000, 1007: " . . . Although the privilege against incrimination must be claimed, when it is claimed

it is guaranteed by the Constitution. Thereafter only absolute immunity from Federal criminal prosecution is sufficient to compel the desired testimony . . . "

This is the first time the Supreme Court has been called upon to pass upon the immunity of a witness, who has testified before a Congressional Committee after refusing to waive his constitutional rights.

Previous cases before the Court have involved immunity before other governmental bodies or juries.

A witness before a congressional committee, under the statutes can not refuse to testify even on the grounds of self-incrimination.

He may be prosecuted for contempt if he refuses to testify, and he may be prosecuted for perjury if he should testify falsely.

IV.

That respondent, in its Brief (Br. 23), argues that even if the conspiracy count is defective for the reasons assigned by the dissenting Judge in the lower Court and even if the conspiracy count is "merged" in the substantive offenses charged in Counts 3 and 4, the judgments of conviction still could not be successfully assailed because each petitioner received an identical sentence of imprisonment under each count, and all sentences were directed to be served concurrently. The Government argues that under such circumstances any good count would sustain the sentences imposed. The difficulty with this argument is that a great mass of so-called conspiracy evidence was received under Count 1—the so-called overt acts related to Count 1. This evidence, which was not admissible to prove the substantive offenses alleged in Counts 3 and 4 (*Glasser* v. *United States*, 315 U. S. 60, 73-75), was not only submitted to the jury as proof under Count 1, but was also used under Counts 3 and 4. Thus, assuming that Count 1 was defective, the petitioners were prejudiced by the jury's being

permitted to consider the testimony erroneously admitted under Count 1 as to all the counts in the indictment.

V.

That in its Brief (Br. 27-28), respondent answered petitioners' contention that the evidence was insufficient to sustain the convictions by making a sweeping statement that the Government's proof of existence of the conspiracy charged, as set forth in the Statement (Br. 5-19), is clear and compelling. The Government adroitly avoids any reference to *Glasser* v. *United States*, 315 U. S. 60, wherein this Court held that admissions of statements by conspirators in the absence of another co-conspirator cannot be used to establish a conspiracy until there is proof aliunde of the existence of conspiracy. All the evidence set forth in the respondent's Statement (Br. 5-19) pertained to alleged overt acts, done in pursuance of conspiracy, and after it was charged to have been formed. The Trial Court found that each and every of the overt acts in respondent's Statement was legal in and of itself.

The Government, by failing to point out any independent evidence in this Record to establish the conspiracy or to establish the petitioners' connection with it other than through admittedly legal overt acts, admits that no such independent evidence is to be found in the Record.

VI.

That the respondent, in its Brief (Br. 32), misstates the position of the dissenting Judge in the lower Court. The Government stated that none of the other contentions made by the petitioners "was found meritorious by the dissenting Judge, whose opinion was based entirely on what he thought were defects in the indictment." (R. 176) This is a misstatement of the fact, for the reason that Judge Stephens, the dissenting Judge, did not even consider these points, as his decision held the indictment and the convic-

tions thereon invalid and, therefore, he did not believe it necessary to consider the other points raised. As stated by Judge Stephens:

> "The defects which I think exist in the indictment are obviously of substantial character and cannot therefore be disregarded under 18 U.S.C. § 556 (1940) or Rule 52(a), Federal Rules of Criminal Procedure. A precedent supporting an indictment with such substantial defects should I think not be set."

CONCLUSION.

WHEREFORE, upon the foregoing grounds, the petitioners respectfully pray that this Petition for Rehearing be granted, and that the orders heretofore entered by this Court on October 10, 1949 denying their Petitions for Writs of Certiorari to the Court of Appeals for the District of Columbia, be reversed.

Respectfully submitted,

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Certificate of Counsel.

We, SAMUEL GOLDSTEIN, attorney for Petitioners, and PERRY W. HOWARD, of counsel for Petitioner Murray W. Garsson, do hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and further, that the Petition is restricted to the grounds specified in Amended Rule 33(2) of the Rules of the United States Supreme Court.

SAMUEL GOLDSTEIN,
Attorney for Petitioners.

PERRY W. HOWARD,
Of Counsel for Petitioner
Murray W. Garsson.